

To Market, to Market: Legislating on Privatization and Subcontracting

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Articles

TO MARKET, TO MARKET: LEGISLATING ON PRIVATIZATION AND SUBCONTRACTING

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INTRODUCTION

One rainy November day, on a visit to Washington, D.C., I stumbled into the nearest refuge, which turned out to be the National Building Museum. No doubt, this is one of the more obscure of the Smithsonian museums and probably the least likely to be on anyone's

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My thoughts about privatization have been shaped by New Zealand during a time in which it was engaged in fundamentally reshaping and privatizing its economy and society. Since that time, I have written extensively about New Zealand labor law and, as part of that work, have kept abreast of the progress of privatization there. This research and these experiences have infused the way I look at the privatization debate in the United States. It is therefore important that I acknowledge certain works. While they are not the source of any specific points made in this Article, I could not have written it without having read them and having absorbed their lessons. Among these would be papers of the New Zealand Business Roundtable, too numerous to list in their entirety here. Other works include JONATHAN BOSTON ET AL., *PUBLIC MANAGEMENT: THE NEW ZEALAND MODEL* (Simon Cauchi ed., 1996); PENELOPE BROOK, *FREEDOM AT WORK* (1990); IAN DUNCAN & ALAN BOLLARD, *CORPORATIZATION AND PRIVATIZATION: LESSONS FROM NEW ZEALAND* (1992); PAUL HARRIS & LINDA TWINAME, *FIRST KNIGHTS: AN INVESTIGATION OF THE NEW ZEALAND BUSINESS ROUNDTABLE* (1998); TIM HAZLEDINE, *TAKING NEW ZEALAND SERIOUSLY: THE ECONOMICS OF DECENCY* (1998); BRUCE JESSON, *ONLY THEIR PURPOSE IS MAD* (1999); JANE KELSEY, *ROLLING BACK THE STATE: PRIVATISATION OF POWER IN AOTEAROA/NEW ZEALAND* (1993); *CONTROLLING INTERESTS: BUSINESS, THE STATE AND SOCIETY IN NEW ZEALAND* (John Deeks & Nick Perry eds., 1992); and *THE STATE UNDER CONTRACT* (Jonathan Boston ed., 1995).

must-visit list. However, what you find inside is a magnificent hall with soaring ceilings, floor and ceiling connected by enormous faux marble columns. On that first visit, the building was in the midst of renovations after years of neglect. Yet even then, its dignity shone through. What is now the National Building Museum was built to house workers who processed payments to Civil War veterans, former members of the Grand Army of the Republic. In other words, it was built for public workers who were providing services for former public workers.

So enervated is our opinion of public service today, it is a shock to conceive of building this sort of edifice for mere government workers—bean counters and paymasters at that. At one time, though, and not so long ago, public buildings were important symbols of the might and majesty of our government and, by close connection, of the people. They embodied this country's image of itself as a shining city on a hill. Government service was a calling, and a noble one. Drive through Ohio's county seats, especially in the more rural areas, and you will recapture the sort of buildings once conceived of as appropriate for housing government.

Government buildings still symbolize how we view government. Today's government buildings are unaesthetic, bland, even depressing places, built on the cheap. They are demoralizing places to transact the public's business. But, no doubt, if polled, most would agree that they are good enough for government workers. Public workers and government work are more likely to be the butt of jokes today than to be held in high esteem. Is it any wonder there is a strong popular movement to shed government work and move it to the private sector? Today the private sector seems to embody our aspirations and is seen as the engine of our nation's prosperity and the best way to improve public services.¹

1. See, e.g., ELLIOTT D. SCLAR, *YOU DON'T ALWAYS GET WHAT YOU PAY FOR: THE ECONOMICS OF PRIVATIZATION* 2 (2000) ("As a new century begins, the alternative to government direction and the employment of public bureaucracy to carry out its commands is a fresh belief in the social beneficence and effectiveness of the marketplace."); Robert H. Wessel, *Privatization in the United States*, 30 BUS. ECON. 45, 45-49 (1995) (noting the increasing rate of privatization in America and citing, as examples, the privatization of waste, water, and housing management, other municipal services, public schools, hospitals, and the postal system); Lynette Holloway, *Shelters Improve Under Private Groups, Raising a New Worry*, N.Y. TIMES, Nov. 12, 1997, at B1 (describing vast improvements in the quality of services provided by New York City homeless shelters as a result of the city's efforts to privatize them).

Representative Christopher Shays noted, in hearings concerning the privatization of welfare reform services:

When I began this Article, I assumed it would assess characteristics of states' subcontracting legislation. To that end, I prepared a checklist of what my study of the issues suggested should be contained in such legislation. Unfortunately for this plan, very few states had enacted comprehensive legislation. At best, there were a handful of states that had done so and a patchwork of miscellaneous legislation in the states that had not.

I was dismayed to discover that I could not write the article I had envisioned—not for myself and my personal goals, but, rather, for what this means for the public's welfare. The newspapers are full of stories of privatization across the country. But as there is almost no legislation on the subject, privatization is occurring without forethought and without guidance. Far too much is at stake for this to be the norm.

So circumstances forced this Article to evolve into a template to assist states in developing their own privatization statutes, an even more useful project than an after-the-fact assessment.

For there is another side to the story of privatization.

On February 20, 1998, the lights went out in Auckland, New Zealand's largest city.² It would be months before it again had a reliable supply of power.³ Auckland's businesses lost millions of dollars.⁴ Companies tried to stay open by using noisy generators.⁵ Diesel smoke filled the air of fashionable downtown streets.⁶ Hundreds of businesses said they would sue Mercury Energy, the private company that had contracted to supply Auckland's electricity.⁷

The answers, released by GAO today, provide an important perspective on the promises and pitfalls of contracting for the private performance of public activities. According to the study, program officials are motivated by "increasing public demand for public services and a belief that contractors can provide higher-quality services more cost-effectively than can public agencies."

Social Services Privatization: The Benefits and Challenges to Child Support Enforcement Programs: Hearing Before the Subcomm. on Human Resources of the House Comm. on Gov't Reform and Oversight, 105th Cong. 3 (1997) [hereinafter *Social Services Privatization*] (statement of Rep. Christopher Shays).

2. See James Gray, *PAC: Electricity Slowly Returns to NZ's Biggest City*, AAP NEWSFEED, Mar. 2, 1998 (reporting that the failure of two pairs of supply cables interrupted the supply of electricity to Auckland, New Zealand).

3. See *id.* (reporting that once the energy supplier repaired Auckland's supply cables, capacity would be limited to fifty percent until a temporary cable was installed nine or ten weeks later).

4. See Graham Reid, *Last One Out, Please Turn the Lights Back On*, OBSERVER (London), Mar. 8, 1998, at 9.

5. See *id.*

6. See *id.*

7. *Id.*

The cause of the blackout and Mercury's lethargic response appears to have been that company's drive for increased profits.⁸ Once disaster struck, it became clear that Mercury had cut too many corners. It had failed to do cable maintenance and to have additional cables in reserve.⁹ It had allowed cables to remain in place for years past their normal life.¹⁰ Mercury had no staff who could perform the repairs, because it had disbanded its local squads of cable-jointers, who had then left the country in search of work.¹¹ Mercury had to locate people with the necessary skills and then fly them in from Australia to make repairs, for not enough repair people with the necessary skills remained in New Zealand.¹²

Just a few months earlier, Californians greeted the new year with the news that a contractor had left the state park reservation system in shambles and had absconded with nearly \$1 million of public money.¹³ Once the contractor ceased its operations, California was forced to close its reservation service, and no new reservations could be made.¹⁴ This was a potential disaster for a state that depends on tourism.¹⁵ Even when the private company was accepting reservations, its workers were unable to provide callers with information about parks, because the business was located outside California, and some reservation clerks had never been in the state.¹⁶

8. See Will Hutton, *Darkness at the Heart of Privatisation*, OBSERVER (London), Mar. 8, 1998, at 24 ("Mercury's commercial objective has not been to distribute electricity. It has been to raise the financial returns from its assets, lift its cash flow and so finance its ambition to take over its rivals . . .").

9. See *id.* (stating that other large cities in New Zealand had up to ten supply cables in comparison to Auckland's four); Reid, *supra* note 4 (reporting that "there is the firm belief the company has spent its time and energy on corporate matters rather than on the smaller things—such as maintenance of cables").

10. See Denise McNabb & Yvonne Martin, *Blacking Out a City*, DOMINION (Wellington, N.Z.), Feb. 23, 1998, at 11 (reporting that the Auckland Electric Power Board, which was Mercury Energy's predecessor, warned Mercury in 1990 that the cables needed to be replaced).

11. See Reid, *supra* note 4, at 9.

12. See *id.*

13. See Virginia Ellis, *Bankrupt Firm Allegedly Kept State Park Fees*, L.A. TIMES, Dec. 31, 1997, at A1 (discussing the investigation into Destinet Services Corporation, a private company that filed for bankruptcy and then failed to turn over \$1 million in state fees).

14. See Editorial, *A Tighter Rein on Privatization*, L.A. TIMES, Jan. 4, 1998, at M4.

15. Cf. Ellis, *supra* note 13, at A1 ("California's park system accommodates about 73 million visitors a year.").

16. Speaking from personal experience, when I made reservations using these services, the workers were unable to answer any questions about the parks and their facilities. The worker with whom I spoke responded to my questions by explaining that she was working out of a call center not located in California, and that she had never been to California. The workers could provide only the most basic service: making reservations. They could not satisfy park visitors' other needs.

And, yet a few months earlier, in *Professional Engineers in California Government v. Department of Transportation*,¹⁷ the Supreme Court of California found that the Department of Transportation had been illegally contracting out engineering work.¹⁸ The court noted that the contracted-out work had cost almost twice as much as having the work done by public employees.¹⁹ The decision in *Professional Engineers* affirms the potential for poorly thought-out subcontracting decisions that save no money and harm the public. Even worse, the circumstances under which the Department of Transportation made the subcontracting decisions raise concerns that some degree of corruption might have been involved—that the contracts were let in return for campaign donations or on the basis of cronyism.²⁰ Regardless of whether these rumors could ever be substantiated, the cost of subcontracting the work to a private consultant was, as the court observed, almost double that of having the work done by state employees.²¹

States may suffer from errors involving privatization in other ways. For example, Missouri taxpayers faced the possibility of being held financially liable for the beating of Missouri inmates by employees of a private prison company in Texas and for costs and fees to defend the resulting lawsuits.²² And more can be lost than just

17. 936 P.2d 473 (Cal. 1997).

18. See *id.* at 492 (upholding the trial court's refusal to modify a 1990 injunction that prevented the Department of Transportation (Caltrans) from contracting with private engineering firms); *id.* at 480 (noting the trial court's decision that Caltrans's illegal conduct consisted of "displacing civil service staff from project development work that staff had historically performed and . . . maintaining staff at an inadequate level to create an artificial need for private contracting").

19. See *id.* at 491 (citing a study plaintiffs submitted to the trial court indicating that the annual cost for one state employee was \$70,000 to \$75,000, and the cost of a private consultant was \$138,000).

20. *Professional Engineers* details the Department of Transportation's efforts to contract out this work in defiance of the law—not only once, but again and again. *Id.* at 478-80.

21. See *supra* note 19. These problems are not isolated. See, e.g., SCLAR, *supra* note 1, at 87 (noting that, in Denver, privately run bus costs increased 100% in the same period that the costs of publicly run lines increased 11%). There are many similar experiences. In 1991, for example, Los Angeles canceled a five-year vehicle-repair contract after an audit showed that the service had cost \$1 million more than expected and had not performed up to the contract's standards. *County Cancels Biggest Contract in Wake of Audit*, L.A. TIMES, Mar. 6, 1991, at B2 [hereinafter *County Cancels Contract*]. Prior to cancelling the contract, Los Angeles County incurred millions of dollars in unanticipated expenses due to contract overruns. Judy Pasternak, *County Coughs Up \$1.2 Million Extra for Fleet*, L.A. TIMES, Dec. 22, 1989, at B1.

22. Don Rudd, *Will Privatization Cause Costs to Soar?*, ST. LOUIS POST-DISPATCH, Nov. 26, 1997, at B7. Illinois, recognizing the inherent problems in privatizing prisons, has banned this process:

The General Assembly hereby finds and declares that the management and operation of a correctional facility or institution involves functions that are inherently

money. Residents of Ellijay, Georgia learned that "three years worth of water quality records were falsified by the private company operating their sewer system."²³ The British suffered even more: illness and death followed problems linked to subcontracting.²⁴

These stories have been repeated across the country and around the world. They are mentioned here not to condemn privatization as inherently bad, but rather to highlight the need for caution and circumspection in subcontracting. Serious, even deadly, consequences hang on these decisions. Because privatization has been taking place for a sufficiently long period of time, one would expect the process to be well-regulated. The shocking truth is that it is not regulated in the overwhelming majority of states and barely regulated in the rest.²⁵ This is imprudent at best and is a disaster waiting to happen at worst.

Unfortunately, what we have seen since at least the 1980s has been a massive movement to privatize public services of all kinds,²⁶

governmental. The imposition of punishment on errant citizens through incarceration requires the State to exercise its coercive police powers over individuals and is thus distinguishable from privatization in other areas of government. It is further found that issues of liability, accountability and cost warrant a prohibition of the ownership, operation or management of correctional facilities by for-profit private contractors.

730 ILL. COMP. STAT. ANN. 140/2 (West 1999); cf. U.S. GEN. ACCOUNTING OFFICE, PRIVATE AND PUBLIC PRISONS: STUDIES COMPARING OPERATIONAL COSTS AND/OR QUALITY OF SERVICE 2 n.4 (Aug. 1996) [hereinafter PRIVATE AND PUBLIC PRISONS] (noting that the privatization of correctional facilities has engendered debate on whether the operation of prisons, an aspect of the administration of justice, is "not appropriately delegable to the private sector").

23. Rudd, *supra* note 22, at B7.

24. See Sean Poulter, *In Wake of E.Coli Tragedy, Water Firms Come Under Fire*, DAILY MAIL (London), Aug. 18, 1999, at 5 (citing allegations that privatized water companies were responsible for "tens of thousands of illnesses" caused by inadequate sewage treatment); *Private Water Health Risks Hushed Up*, INDEPENDENT (London), Mar. 9, 1997, at 2 [hereinafter *Private Water*] (reporting that "Britain's private water companies have put public health at risk on more than 500 occasions over the past six years").

25. Only Alaska, Colorado, the District of Columbia, Kansas, Kentucky, Louisiana, Massachusetts, Montana, and Utah provide anything approaching comprehensive regulation of government subcontracting. See ALASKA STAT. §§ 36.30.005 to 36.30.020 (Michie 1992 & Supp. 1995); COLO. REV. STAT. ANN. §§ 24-50-501 to 24-50-513 (West Supp. 2000); D.C. CODE ANN. §§ 1-1181.5b to 1-1181.7 (1999 & Supp. 2000); KAN. STAT. ANN. §§ 12-5501 to 12-5511 (1991); KY. REV. STAT. ANN. §§ 45A.550 to 45A.554 (Banks-Baldwin 2000); *id.* § 11A.130 (Banks-Baldwin 1995); LA. REV. STAT. ANN. §§ 49:193 to 49:196 (West 1987 & Supp. 2000); MASS. GEN. LAWS ANN. ch. 7, §§ 52-56 (West 1996 & Supp. 2000); MONT. CODE ANN. §§ 2-8-301 to 2-8-304, 2-18-1206 (1999); UTAH CODE ANN. §§ 63-55a-1 to 63-55a-3, 63-95-102, 63-95-401 to 63-95-403 (1997 & Supp. 2000). Other states have piecemeal legislation directed to specific programs. Some of these less ambitious attempts at privatization legislation are discussed throughout this Article.

26. See U.S. GEN. ACCOUNTING OFFICE, PRIVATIZATION: LESSONS LEARNED BY STATE AND LOCAL GOVERNMENTS 2 (1997) [hereinafter LESSONS LEARNED] (discussing a survey by the 1993 Council of State Governments that "found that state agencies responsible for social

without the benefit of uniform and well thought-through regulation. The claims made for the benefits of privatization are many and portentous. Privatization is supposed to have all the virtues attributed to the market and competition—to provide the best service at the lowest price. Some hold these assumptions so strongly that several years ago, and even now, it was possible to claim—and face no demand for proof—that the public sector is always inefficient and more costly, and that the private sector always provides superior services.²⁷

The ideas that privatization is always better and can foster any goal has even been incorporated in, or at least has shaped, legislation in some states. For example, the goals of privatizing the “Arizona works” program for welfare recipients are:

1. Fostering the development of responsible and productive citizens through program administration that provides participants with incentives to achieve self-sufficiency.
2. Making certain administrative processes more efficient and cost-effective.
3. Encouraging innovative partnerships with organizations that enhance the Arizona works program.

services, transportation, mental health care, corrections, health, and education had all increased privatization activities since 1988” and explaining that “the survey results indicated a trend toward expanded privatization across major state agencies”); *see also* ROBERT HEBDON, *THE PERILS OF PRIVATIZATION: LESSONS FOR NEW YORK STATE* 2 (Dec. 1994) (explaining that “[i]n New York State an attempt has been made by privatization ideologues to create a climate of inevitability around the transfer of otherwise public services to the private sector”); *id.* at 6-15 (discussing the types of groups supporting privatization and describing the claimed advantages of a move toward contracting out government services).

Privatization is heavily promoted. For example, AIC Conferences sponsored a conference in 1995, saying: “THE OPPORTUNITIES FOR THE PRIVATE SECTOR ARE ENORMOUS. With the growth in public-private partnerships, asset sales, employee stock ownership programs and the contracting out of government services, the time is right to position yourself for success and PROFIT.” Letter from Stavroula Gouliaditis, Senior Conference Manager, AIC Conferences 1 (May 1995). The two-day conference cost \$1295 to attend.

27. For such an important issue, there have been few useful, comprehensive, nonpartisan studies. Even studies that find lower costs for privatization have, upon investigation, not provided guidance to other jurisdictions considering privatization. For example, the General Accounting Office (GAO) found that studies concerning prison privatization offered “little generalizable guidance for other jurisdictions about what to expect regarding comparative operational costs and quality of service.” *PRIVATE AND PUBLIC PRISONS*, *supra* note 22, at 3. The GAO’s report found that some studies focused only on “specialized inmate populations”; others had serious methodological weaknesses, such as “using hypothetical facilities or nonrandom survey samples”; contexts differed so greatly among states that the individual studies might not apply outside the state in which the study took place; other factors, such as the age of the system studied, also had an impact on the studies. *Id.* at 3-4; *see also* HEBDON, *supra* note 26, at 25-27 (discussing the problems associated with statistical studies on privatization).

4. Providing an opportunity for a system that is heavily dependent on human interaction and subjective determinations to offer performance incentives for employees and the flexibility to hire and promote successful individuals.
5. Ensuring that applicants who are qualified for benefits in the department of economic security empower redesign program, including any income disregards, are automatically qualified for the Arizona works program.²⁸

While some of these goals may be reasonable for such a program, there is nothing about privatizing the program that necessarily would lead to achieving them or to achieving them more successfully than would public administration—particularly goals (1), (4), and (5).

Logic and a more realistic assessment of market processes suggest that privatization is likely to have the sort of flaws that all human institutions do. Indeed, greater experience with privatization has already provided the opportunity for a better, more realistic understanding of public services and subcontracting to which an overly simplified theory should give way. We know that spectacular privatization failures have occurred, costing taxpayers money and lost services.²⁹ The question is how to use this knowledge to prevent failure, and, when failure nonetheless happens, how to soften its impact.

Even those strongly committed to the market should not be opposed to creating safeguards for subcontracting. This is certainly an area in which ideological lines are drawn. However, it is easy to see that blind ideological commitment to privatization creates a danger of victimization. Much is at stake when public work is subcontracted, so it should also be easy to accept that it is wise to be cautious.

On the other side, rigid opposition is not appropriate. Government has always contracted with the private sector for some services and goods it would rather buy than make, such as paper, computers, pens, and many other items readily available on the market. However, the fact that some items can be successfully purchased in the market does not mean that *all* can. The problem is ascertaining which can be

28. ARIZ. REV. STAT. ANN. § 46-342(B) (West Supp. 1999).

29. See *supra* notes 2-25 and accompanying text (discussing examples of failures in privatization). Among these failures are enormous cost overruns and the flouting of environmental and other laws by subcontractors. See Joshua Wolf Shenk, *The Perils of Privatization*, WASH. MONTHLY, May 1995, at 16 (describing cost overruns of millions of dollars in cases where the government used contracts that contained incentives for contractors to overcharge the government). For example, Rockwell International illegally stored and dumped toxic and radioactive waste at the Department of Energy's facilities in Rocky Flats, Colorado. *Id.* at 17-18.

best provided by the market and which cannot. Law can help decisionmakers sort through the data involved.

Recent experiences with privatization have given us the ability to generate a more realistic—hence, a more complex—understanding of the nature of government services. Economist Elliott Sclar points out that the debate over how to provide public services offers “a valuable opportunity to meaningfully improve public service.”³⁰ Sclar further explains that “[t]he debate . . . presents us with a rare chance to move the issue of improving the efficiency and effectiveness of public service provision from the policy back burner to the front.”³¹

Hardline ideology, simplistic theories, and slogans make it easy to draw lines and make decisions, but not necessarily good ones. A politician may believe that she can better advance her career by making an unsupported claim to have saved the taxpayers money by contracting out public services than by explaining the nuances of market theory—and she would probably be right. News stories announcing subcontracting decisions and projected savings are likely to be front page material, while reports of subsequent problems are more likely to be buried. An agency that privatizes may be able to cut its costs, but only by quietly and less visibly shifting them to another agency or to the public. As tempting as it is to avoid the complex decisions necessary to decide whether a specific service is best provided by the public or private sector, legislators know that they have a responsibility not to waste public money, and they certainly do not want to be accused of causing waste by making ill-advised, poorly thought-through decisions.

In addition, some municipalities must be given express authority by their state legislatures to privatize government functions:

Under governing principles of law, political subdivisions of a state cannot engage in any activity unless they have received explicit authority from the state legislature. The only exception to this rule exists where a locality has received “home rule” power either in the state constitution or from the state legislature. A locality that possesses “home rule” may initiate legislative programs without prior approval from the legislature. It seems relatively clear that the decision to contract with private firms for the provision of a particular good or service would be subject to this rule of plenary state power. Thus, a locality that desired to privatize one or more of its functions would presumably have to receive explicit authority to do so or would have to possess “home rule” power.

30. SCLAR, *supra* note 1, at 5.

31. *Id.*

The scope of "home rule" is itself somewhat ambiguous, though courts are likely to include within that category any activity that has minimal effects outside the jurisdiction. A home rule locality might be able, for instance, to contract out for street paving services, while a non-home rule locality might be able to do so only if it had explicit authority from the legislature.³²

Subcontracting legislation may thus do more than simply assist municipalities; it may be required by state law.

The time is long overdue for comprehensive subcontracting law in every state. Privatization is likely to remain popular. If states continue to subcontract with no suitable law to provide the guidance that experience tells us is necessary, waste and poor service are likely to result. At worst, there may be disasters. This Article advances a template for those states that want both to consider privatization and to protect the public interest. It does so by advancing procedures that states should establish for assessing whether to subcontract and by describing safeguards and oversight mechanisms that states could use to ensure that, if subcontracting takes place, disasters do not occur. Examples of current state legislation are used to assess how states are in fact meeting or failing to meet these fundamental requirements.

I. DESIGNING A TEMPLATE FOR SUBCONTRACTING LEGISLATION

Privatization itself is a blanket term that includes different forms of shifting from publicly to privately produced goods and services. Professor Paul Starr explained:

Policies that encourage such a shift include (1) the cessation of public programs and disengagement of government from specific kinds of responsibilities; (2) sales of public assets, including public lands, public infrastructure, and public enterprises; (3) financing private provision of services—for example, through contracting out or vouchers—instead of directly producing them; and (4) deregulating entry into activities that were previously treated as a public monopoly.³³

32. Clayton P. Gillette & Paul B. Stephan III, *Constitutional Limitations on Privatization*, 46 AM. J. COMP. L. 481, 501 (1998). Kansas, for example, permits municipalities to privatize "any capital intensive public service" that the municipality may legally provide. KAN. STAT. ANN. § 12-5502 (1991).

33. PAUL STARR, ECON. POL'Y INST., *THE LIMITS OF PRIVATIZATION* 2 (1987); see also LESSONS LEARNED, *supra* note 26, at 1 (stating that privatization can take many forms, the most common of which is contracting).

Here, the focus will be almost solely on the third—contracting out or subcontracting—and, to some degree, on the first.

Beyond soliciting bids and awarding contracts to the lowest bidder, is there anything more that should be considered in subcontracting? If so, what and why? To answer these questions, it is first helpful to step back for a quick overview of some of the economic issues involved when considering public versus private provision of goods and services. All too often, an appealing but overly simplistic model of the market is used as a basis for explaining privatization—one that stops at competition and never goes on to take into account the well-known problems that occur when markets do not work. For anyone who doubts that there are such problems, just consider jokes about military purchases of toilet seats and screwdrivers. In fact, defense department purchases can be thought of as a massive privatization scheme in which the government tries to get private companies to meet specifications as to quantity, quality, and price, and in which there have been constant failures to achieve these specifications. Such failures warn us that having the private sector provide services will not automatically solve all problems of quality and cost.

Privately provided services are nothing new. In fact, there has always been a tension in United States history and elsewhere over whether the government or the private sector can best buy or produce a service or product. In other words, privatization is not a big new thing that will remake the world.

Economists and others have concluded that many services can only be effectively provided by government—for example, where continuity of service is essential, where no profits are generated, and where no competition exists or can exist.³⁴ Many government services are natural monopolies where there is naturally no competition and, thus, no market impetus for improved service at lower cost. In addition, in some situations, bigger does mean cheaper, and the first big provider can drive all competitors out of business because it can undercut their prices and still make a profit. Once it has a monopoly, such a provider can then charge whatever price it wishes. In this situation, the public cannot rely on the market, but instead needs government to run or regulate the natural monopoly.

Indeed, it is for these sorts of reasons that many services came to be provided by the government. Welfare, child protective services,

34. See, e.g., SCLAR, *supra* note 1, at 24-28 (noting that services such as national defense, fire protection, and the operation of lighthouses share characteristics that make them ill-suited for privatization).

road construction and maintenance, public health, education, and many others began as private services, but problems of corruption, predatory pricing, and poor quality eventually led the government to take them over in an effort to promote the public welfare.³⁵ Other related problems led to the establishment of the Civil Service and its rules, which attempt to prevent corruption and ensure that governmental employees serve the public interest.³⁶

It is always a mistake to assume without investigation that the past can teach us nothing. Before engaging in a single-minded pursuit of privatization, it is worthwhile to consider whether these problems existed only under very different circumstances, or whether we may be blindly heading down a track where we will be condemned to repeat the lessons of the past.

We need to ask: when markets are not competitive, can the private sector improve on public sector performance even as it falls short of the competitive ideal?³⁷ Although it is possible to attempt to create a market by dividing a public service into smaller units, doing so may lead to greater inefficiency, lack of coordination, duplication, and, as a result, greater expense. Indeed, competition may not be possible in all parts of the country and may be a particular problem in rural areas and where technical expertise is needed. Such areas may suffer from cherry-picking, which occurs when private companies are allowed to operate only the profitable parts of a service, leaving the government to operate those that are most expensive.

Many public services are public goods. In economists' terms, these services generate positive externalities—they have positive side

35. See *id.* at 1 (explaining that at the turn of the twentieth century, "[s]tate power was the only countervailing force capable of checking the antisocial excesses of the emergent class of economic oligarchs or 'robber barons' spawned by the new industrialization"). See generally Moshe Adler, *The Origins of Governmental Production: Cleaning the Streets of New York by Contract During the 19th Century* (2000) (unpublished manuscript, on file with author) (describing the problems with private delivery of services at the turn of the twentieth century that led to government provision of services).

36. See Lydia Segal, *Can We Fight the New Tammany Hall?: Difficulties of Prosecuting Political Patronage and Suggestions for Reform*, 50 RUTGERS L. REV. 507, 508 (1998) (explaining that, in response to the system of political patronage that persisted in the mid-1800s, reformers pushed for passage of the Civil Service Act of 1883, hoping to "closely regulat[e] how employees could be hired, fired, promoted, and demoted").

37. See CRAIG RICHARDS ET AL., *ECON. POL'Y INST., RISKY BUSINESS: PRIVATE MANAGEMENT OF PUBLIC SCHOOLS* 141 (1996) (suggesting that this line of inquiry is appropriate); see also SCLAR, *supra* note 1, at 69-93 (arguing that many privatization contracts benefit monopolies or oligopolies, and thus one must consider the real-world play of the market in making individual decisions about privatizing services).

effects that cannot be confined only to those who pay for them.³⁸ Vaccination, for example, protects both the one vaccinated and others who are less likely to contract the disease, because the pool of potential carriers is smaller. Street lighting is another classic example. Education benefits not only the one who receives it, but also those who gain by having a more educated populace. Public goods create a temptation to become a free rider, to get the benefits without paying. Under these circumstances, soon no one will be willing to pay for the service or good, so it must be provided by government if it is to be provided at all.³⁹

In many cases, government services are ones for which price competition is not as important as ensuring guaranteed results. We want the Centers for Disease Control (CDC) to track down and prevent threats to the public health far more than we want that agency to operate cheaply or at a profit. A private vendor may not have as much interest in controlling disease as in increasing the price of its stock and returning value to its shareholders.

Finally, a subcontractor's need to add profit and its higher cost of borrowing create a hurdle that makes it harder for the private sector to deliver projects and services at lower cost.⁴⁰ Indeed, a March 1994

38. See ROBERT HEILBRONER & LESTER THUROW, *ECONOMICS EXPLAINED: EVERYTHING YOU NEED TO KNOW ABOUT HOW THE ECONOMY WORKS AND WHERE IT'S GOING* 189-90 (rev. ed. 1994) (discussing the importance of computing "good" and "bad" externalities).

39. Elliott Sclar provides a different breakdown differentiating public services from private markets. See SCLAR, *supra* note 1, at 23-28, 47-49. Sclar speaks of goods that are excludable and rivalrous. See *id.* at 23-26. Private goods are both. That is, one who has the goods—Sclar uses the example of a theater ticket—can exclude others from its use, and there is competition for the good. *Id.* at 23-24. Pure public goods are nonexcludable. *Id.* at 24. Sclar uses the example of a lighthouse. *Id.* Just because one ship uses the light does not mean that another cannot use it. Some goods, however, fall between the two so that there is some potential degree of excludability and rivalrousness. *Id.* at 24-25. These may be provided in part by private vendors, but also by the public service. See *id.* Sclar contends that what sets these apart from purely private goods is that they generate externalities. *Id.* at 25. For example, he says, mail service can be provided in part by private carriers, but such carriers cannot and will not take up the cost of providing service to the extent that the Postal Service does; in addition, having a uniform, low-cost mail system generates positive benefits that a number of systems do not. See *id.* This quality makes it reasonable for the good or service to be provided publicly. See *id.*

40. Indeed, the Freedom from Government Competition Act of 1997 implicitly recognized this. See H.R. 716, 105th Cong. (1997). This Act would have required federal agencies to procure all goods and services from the private sector, *id.* § 3(a), except for those that are "inherently governmental in nature," *id.* § 3(c)(1)(A), or deemed important to national security, see *id.* § 3(c)(2). Under the Act, federal agencies could have also used government goods and services where the private sector fails to meet government needs, *id.* § 3(c)(4), or where government provides the best value, *id.* § 3(c)(3). Joan M. Flynn, *Federal Employees: Outsourcing Proposal for Government Encounters Criticism from White House*, 1997 DAILY LAB. REP. (BNA), No. 120, at D-17 (June 23, 1997).

General Accounting Office (GAO) report showed that the government could enjoy substantial savings by directly performing certain functions rather than by subcontracting the work to private companies.⁴¹

This is not to say that all work currently performed by government must stay with government. Rather, we must recognize that, just as there are things the private sector does well, there are rational reasons why government has come to perform many services, and, if we examine a service objectively, we may decide that these reasons require it to remain publicly provided. The question is how to provide that objective scrutiny.

Subcontracting legislation should address both substantive concerns, that is, the benchmarks and standards to be applied to measure performance, as well as procedural concerns, that is, establishing a fair, honest, and reasonable way to make decisions as to subcontracting. Uniform substantive criteria that establish benchmarks that subcontracting must achieve assist the decisionmaker who otherwise lacks guidance in deciding certain questions. Such criteria also ensure that reasoned decisions are made, that oversight can be and is exercised, and that the public welfare is protected if problems arise and a contract must be terminated. Indeed, here, as elsewhere with privatization, simple remedies may not be effective. Merely terminating a contract may not be a useful remedy if the contractor would prefer that result to having to meet the contract's requirements.⁴² Procedural safeguards provide a reasonable process that ensures that decision-making is transparent, due process is given, and the public interest is furthered.

Substantive criteria and procedural safeguards foster uniform procedures within a state⁴³ and can allow decisionmakers to capitalize on an administration that is trained and experienced. Protective measures can ensure that subcontracting does not take place on an ad hoc

41. Chris Hanna, *Federal Employees: Unions Say Contracting Out Cuts Services, Saves No Money*, 1997 DAILY LAB. REP. (BNA), No. 191, at D-20 (Oct. 2, 1997). See generally U.S. GEN. ACCOUNTING OFFICE, *OVERHEAD COSTS: UNALLOWABLE AND QUESTIONABLE COSTS CHARGED BY GENERAL CONTRACTORS* (1994).

42. This was the case with Educational Alternatives, Inc., (EAI) regarding its contract with the Baltimore school system. RICHARDS ET AL., *supra* note 37, at 154. See generally Memorandum from Alva Rivera, Vice President, San Diego Teachers Association (SDTA), to SDTA Board of Directors (Dec. 1, 1993) (on file with author) (discussing the six major components of the EAI program and reporting sixteen particular problems or concerns with the program).

43. Cf. LESSONS LEARNED, *supra* note 26, at 10 (discussing the opinions of officials of six state governments that "once political leaders introduce privatizations, they need to establish a formal structure to ensure effective implementation").

or after-the-fact basis. Freeing decisionmakers from having to invent criteria in each instance also frees them from worries that they might have overlooked relevant factors. Put together, this also means that the process can be more streamlined, less cumbersome, and less costly.

II. SUBSTANTIVE CRITERIA

Substantive criteria must address problems that experiences with subcontracting have revealed. States that have legislated subcontracting standards provide useful insights into the range of requirements to be included. Once these substantive criteria are developed, they can be inserted throughout the process of making privatization decisions, wherever the decisionmaker feels they are relevant.

A. *Determining Policy Goals*

States that advocate privatization—rather than taking a more balanced approach—implicitly assume that privatization will always and automatically achieve improved public service at lower cost. Arizona, for example, requires that the administration of its welfare program be contracted out.⁴⁴ This demonstrates a strong faith in the value of privatization, but offers no opportunity to test such faith.

Furthermore, such an approach fails to recognize that the goals of public service have always been larger than merely providing a service at the lowest cost. Public education, for example, is intended to do more than merely teach reading and writing or simply prepare students to join the workforce. It is intended to transmit a sense of shared identity and to support our democracy by ensuring that all citizens can take on the task of self-governance. The Postal Service delivers mail, but more important is its role in helping knit a very large country together and in promoting productivity and democratic engagement by ensuring that all residents in every area, no matter how remote, can communicate. A highway gets a traveler from point A to point B, but a network of public highways that reaches even remote, less traveled areas unites the country and promotes commerce. It is important, then, to bear in mind that although discrete parts of these goals can be run at a profit, the whole may not be profitable because

44. See ARIZ. REV. STAT. ANN. § 46-300.01(A) (West Supp. 2000) (setting forth the requirement that Arizona contract out its “jobs program”); *id.* § 46-342(A) (setting forth the requirement that Arizona contract out its “works program”). The Arizona “jobs program” provides wage subsidies to employers who hire welfare recipients. *Id.* § 46-299(J). The “works program” provides temporary assistance to needy families. *Id.* §§ 46-340(A), 46-341(2).

some parts cannot be made profitable. Furthermore, achieving larger goals vital to us as a nation may be priceless, but cannot always be done at a profit. Thus, while it is possible to educate people, deliver mail, and operate tollroads at a profit, it is not necessarily possible to educate all people, deliver all mail, and provide a network of highways *and* make a profit. Indeed, for many of these services, the value of having the whole system is far greater than the sum of its parts—and, particularly, of its profitable parts. Although monetary value is important, there is no reason to think that these traditional goals of government are no longer worthy of defending. Thus, where these goals conflict, a decision must be made as to which trumps the other and how all are to be accommodated.

Some jurisdictions have taken a more holistic view of privatization and its goals than has Arizona. The District of Columbia, for example, requires a demonstration that privatization involving services essential to health or safety will not “adversely affect the recipients.”⁴⁵ Massachusetts expresses a particularly wide range of goals in its privatization policy:

The general court hereby finds and declares that using private contractors to provide public services formerly provided by state employees does not always promote the public interest. To ensure that citizens of the commonwealth receive high quality public services at low cost, with due regard for the taxpayers of the commonwealth and the needs of public and private workers, the general court finds it necessary to regulate such privatization contracts⁴⁶

Massachusetts is not at the opposite end of Arizona; it does not forbid subcontracting. But it is at the opposite end in looking at privatization with open eyes rather than with blind faith.

B. Preventing Fraud, Criminal Activities, and the Spoils System Redux

States face a number of risks when fraud, criminal activities, and neo-spoils systems arise in connection with privatization. First, the presence of these problems means that services are not being provided, value is not being received, or revenues are being siphoned off. In addition, if care is not taken, a state may find itself legally liable for a contractor’s misdeeds as well as practically liable when it must make

45. D.C. CODE ANN. § 1-1181.5b(a)(9) (1999 & Supp. 2000); *see also* D.C. CODE ANN. § 1-1191.3(b)(6) (1999) (establishing the requirement that the contracting out of fleet management services for the police department must not “adversely affect the delivery of services to District residents”).

46. MASS. GEN. LAWS ANN. ch. 7, § 52 (West 1996).

up any shortfall.⁴⁷ These problems must be addressed before contracting out.

Most fundamentally, subcontracting legislation must be proactive. It must bar individuals and companies who have engaged in past criminal activities.⁴⁸ History shows instances in which services contracted for have not been performed or outright theft and misfeasance have occurred.⁴⁹ Other service providers have violated laws, including safety requirements.⁵⁰ Some have been repeat violators.⁵¹ Considering the essential nature of most government services and the sensitive content of others, those entrusted with performing them must not use their positions as an opportunity to loot the public coffers or put the public health and welfare at risk; legislatures cannot

47. See, e.g., *infra* note 68 (describing a situation which the state of Michigan became liable for debts incurred by a terminated contractor).

48. A failure to do so can open a governmental entity to great liability. For example, Michigan recently awarded a contract to Correctional Medical Services, Inc. (CMS), of St. Louis, a company that was under indictment for causing the death of an inmate in North Carolina. See Dwight F. Blint, *Medical Miscues Cited at Prison*, HARTFORD COURANT, Aug. 26, 2000, at A1 (discussing the legal problems of CMS and noting that the company was charged with manslaughter in connection with an incident that occurred in a North Carolina prison); *Union Sues over Prisoner Medical Care*, S. BEND TRIB., May 26, 2000, at D4 (noting that the United Auto Workers filed suit against Michigan, "claiming prisoner health could suffer" if the state privatized health care services for inmates by entering into a contract with CMS). One of CMS's doctors, who lost his license to practice in Michigan for having sex with patients, was hired by the company to run statewide psychiatric services in Alabama. See Judy Putnam, *UAW Sues to Stop Prison Health-Care Plan*, ANN ARBOR PRESS, May 26, 2000, at <http://aa.mlive.com/index.ssf?/news/stories/20000525private.frm>. An opinion from an Idaho judge stated that care provided by the company had been more like "physical torture than incarceration" in the case of one inmate. *Id.*

Los Angeles County, in a somewhat similar case, fired a vehicle-repair contractor for poor performance and for costing the county \$1 million more than the contract amount. See *County Cancels Contract*, *supra* note 21, at B2. At the time the contract was formed, the contractor was being investigated for "criminal activity in the management of a \$250-million service contract at Redstone Arsenal, the Army's missile headquarters in Huntsville, Alabama." Victor Merina, *L.A. County Pact with Holmes & Narver Is Upheld Despite Federal Probe of Firm*, L.A. TIMES, July 20, 1988, at D6. The activity was alleged to have included a 262% overcharge. *Id.* Despite this knowledge, ardently pro-privatization city counsel members decided to enter into the contract. See *id.*

49. See generally SCLAR, *supra* note 1, *passim* (discussing examples of privatization efforts that failed due to the incompetence or misfeasance of the contractor). Examples of such incidents also appear throughout this Article.

50. See, e.g., Blint, *supra* note 48, at A1 (discussing the many fines levied against a private prison provider for repeated failure to follow medical safety requirements); Rudd, *supra* note 22, at B7 (reporting that in Ellijay, Georgia, three years worth of water quality records were falsified by the private company responsible for sewage treatment); *Private Water*, *supra* note 24, at 2 (indicating that private water companies in the United Kingdom put public health at risk over 500 times). Other examples may be found throughout this Article.

51. See *supra* note 50.

turn a blind eye to problems such as corruption and illegality no matter how enticing a low bid may appear.

Other actions, while not crimes, may verge on the fraudulent and thus subvert the intent of subcontracting. Before awarding a contract, an investigation should be made to determine whether a subcontracting situation involves real competition and not private employers dividing up jobs in such a way as to ensure they do not compete with one another. This is easy to do when contracts are offered for different routes or geographic regions. Although the service is provided in parts and by apparently different providers, the employers are not really in competition with one another. For example, ostensibly independent bidders on providing bus service in Denver actually had an interdependent relationship at the national level.⁵² As a result, bus lines run by differently named companies were a *de facto* monopoly.⁵³

Another recognized problem has been that of patronage. Colorado declares that its policy concerning privatization encourages the use of private contractors "to achieve increased efficiency . . . without undermining the principles of the state personnel system requiring competence in state government and the avoidance of political patronage."⁵⁴ It bases this policy on a recognition "that the ultimate beneficiaries of all government services are the citizens of the state of Colorado."⁵⁵ The state legislature therefore declares as its intent "that privatization of government services not result in diminished quality in order to save money."⁵⁶

Patronage can take many forms in subcontracting. If contractors employ former government officials, this effectively creates a vested interest in having contractors and can affect whether decisions are made in the public interest.⁵⁷ Therefore, subcontracting legislation must address whether members of a subcontracting decisionmaking or oversight body are to be barred from, or limited in accepting, employment with a contractor.⁵⁸ Legislation should also consider

52. See SCLAR, *supra* note 1, at 87-88.

53. See *id.* at 87 (explaining that the two providers effectively "controlled the private-transit market in Denver").

54. COLO. REV. STAT. ANN. § 24-50-501 (West Supp. 2000).

55. *Id.*

56. *Id.*; see also *id.* § 24-50-503(f) (III) (explaining that in assessing the public's interest in having services performed by government, the personnel director shall consider "[t]he extent to which the contracting preserves the principles of competence in government and the avoidance of political patronage").

57. Cf. RICHARDS ET AL., *supra* note 37, at 174-75 (noting that conflicts of interest exist when "[c]ontractors . . . employ persons with whom they had previously dealt in an official capacity").

58. Oklahoma provides an example in its subcontracting legislation:

whether other parties might be improperly affected if they are allowed to accept employment with a contractor, even though those parties do not serve on an oversight or decisionmaking body. An example of such parties would be high public officials and administrators of an agency when less than the entire workforce is subcontracted. Those who continue to administer the unprivatized part of the agency should perhaps also be barred from accepting employment with a contractor.⁵⁹ In addition, a decision needs to be made as to whether there should be limits on the ability of any of these administrators, board members, or officials to work for lobbyists who represent current or potential subcontractors or bodies advocating positions on privatization. Finally, if there are to be bars, details must be worked out as to their geographic, subject-matter, and time limits.

Even with the best prior investigation, it is possible to have missed problems with a contractor or to have a problem arise with no prior evidence. This vulnerability can take two forms. The first is having to intervene quickly to ensure continuity of service when such problems arise. The second is limiting governmental liability for the contractor's misdeeds. Government should not leave itself vulnerable to these occurrences.

One obvious method of preventing the first form of vulnerability is requiring contractors to post bonds and secure insurance. Furthermore, when illegalities or tortious actions take place during the term of a contract or when a serious disqualifying activity is discovered, the government should have the right to immediately terminate the contract and step in.⁶⁰ Such a protection may need to be negotiated in the contract, but should also be provided by law. Other methods of

Any state officer or employee who exercises discretionary or decision-making authority in awarding a privatization contract shall be prohibited for a period of one (1) year . . . from becoming an officer or employee of a business organization which is a party to any privatization contract with the state agency in which the state officer or employee exercised such discretionary or decision-making authority.

OKLA. STAT. ANN. tit. 74, § 590 (West Supp. 2001).

59. *Cf.* MASS. GEN. LAWS ANN. ch. 268A, § 5(a) (West 2000) (prohibiting former state employees from acting as agents or attorneys for, or receiving compensation from, "anyone other than the commonwealth or a state agency, in connection with any particular matter in which the commonwealth or a state agency is a party or has a direct and substantial interest and in which he participated as a state employee while so employed"). *But cf.* KY. REV. STAT. ANN. § 11A.130 (Banks-Baldwin 2000) ("Nothing in this chapter shall be construed to prohibit an officer or public servant employed by an agency that is privatized from accepting employment from the person or business which is operating that agency.").

60. Rudd, *supra* note 22, at B7; *see also id.* (arguing that absent the ability to terminate, citizens bear not only the cost of the service, but also tort liability and costs to communities caused by the replacement of "decent-paying jobs" with low-wage jobs).

being proactive about these problems are implicit in the other protections discussed throughout this Article.

Taxpayers must also be protected from liability for the actions of subcontractors. Some state legislatures have taken steps to ensure that responsibility remains with the contractor. Colorado, for example, provides that the contractor bears the liability for its actions and may not plead sovereign or governmental immunity as affirmative defenses for any acts arising from the performance of its contract.⁶¹ As a solution, this is not as simple as it may appear. While taxpayers should not be liable, it may be impossible to avoid paying extra (at least in the short run) to ensure that other taxpayers do not suffer a loss when the contractor proves unreliable. In addition to tort or tort-like liability, a state may find itself ultimately liable for unpaid bills. Michigan, for example, terminated a contract with its private prison health care provider, but then found itself liable to pay forty percent more for the contract of the successor, who had paid off \$12 million of its predecessor's unpaid bills.⁶²

In short, it is wise not to be foolishly sanguine about subcontracting and forego the sorts of prudent measures that have been developed over the years to protect against fraud, criminal activities, and the spoils system. These measures include investigation, laws that clarify which activities should be of concern, and methods to limit and remediate any losses.

C. Apples and Oranges: Making Costs Comparable and Making Reliable Quality and Quantity Assessments

Everyone knows that sales, markdowns, and discounts cannot be taken at face value. The "original" price may be exaggerated, or the seller may use a bait and switch tactic, offering an item that may not be of the same quality or an item that does not offer the range of features most shoppers would desire. The same ideas apply to subcontracting.

It is impossible to know if money will be saved without reliable information about the existing service, the comparable costs, and the comparative quality of the existing service and the subcontracted service. Therefore, a crucial early step in the subcontracting process is

61. COLO. REV. STAT. ANN. § 24-50-505 (West Supp. 2000); cf. *Richardson v. McKnight*, 521 U.S. 399, 412 (1997) (holding that private prison guards are not entitled to immunity from suit in actions filed under 42 U.S.C. § 1983 (1994)).

62. Putnam, *supra* note 48; see also *supra* note 48 (discussing this incident).

deciding which costs are properly included.⁶³ Experience has shown that obtaining precise and complete cost information is no simple matter; as a result, most governments have used only estimated cost and performance data in subcontracting.⁶⁴ The flaws of such a practice are clear. Without accurate data, it is impossible to be certain that subcontracting benefits the taxpayers.

Assuming that accurate and complete cost data for a public service is obtained, it is then essential that comparable costs be used in assessing both the public and private provision of that service. Unfortunately, experience has shown that, for a number of recurring reasons, comparable costs are not always used.

For example, when only part of a service is subcontracted, especially when that part is less expensive, the government will be left to provide the more expensive part. Similarly, it would be inappropriate to compare the costs of running private prisons with government prisons if the private prisons were all low security and the government prisons were all high security,⁶⁵ but this has been done. Thus, part of comparing and determining costs (just as when individual consumers shop) is determining whether the quality of the items being compared is the same.⁶⁶

Another common problem occurs when overhead costs are included in the public service's costs (because they are imbedded in the government department's budget), but are not included in the con-

63. Colorado requires that the costs of providing comparable levels of service be analyzed. Those costs "include the salaries and benefits of staff that would be needed and the cost of space, equipment, and material needed to perform the function." COLO. REV. STAT. ANN. § 24-50-503(1)(a)(I); *see also* HEBDON, *supra* note 26, at 27-30 (setting forth a framework for comparing private and public costs when making a decision of whether to privatize a service).

64. *See* LESSONS LEARNED, *supra* note 26, at 5 ("Most of the governments we surveyed used estimated cost data because obtaining complete cost and performance data by activity from their accounting systems was difficult." (footnote omitted)). The report notes that discussing accounting issues with private firms as part of the process of assessing costs can be helpful in gaining a better understanding of cost and quality issues. *Id.* at 13.

65. *Cf.* Shenk, *supra* note 29, at 21 (explaining that "private prisons are almost exclusively low-security—cheaper to operate than higher security prisons").

66. A similar problem can occur when comparing costs from one state to another. When attempting to predict or assess subcontracting costs, it may not be possible simply to extrapolate costs from one state to another. Geraldine Jensen, President of the Association for Children for Enforcement of Support, contended that Lockheed Martin IMS was receiving seven times as much money in Maryland as it was in Virginia for doing exactly the same type of work. *Social Services Privatization*, *supra* note 1, at 144 (statement of Geraldine Jensen). She asked: "Who is responsible for monitoring contracts states have with private vendors?" *Id.* Jensen may be correct in her concern, but different states, even adjacent ones, may have different legislative, economic, and other considerations, which means that the work provided is not exactly the same.

tracted-out service's costs, even though those same overhead and oversight costs will continue.⁶⁷ This means that services could be privatized even though they were actually being done more economically by public sector workers. Indeed, failing to have comparable cost accounting makes it impossible to avoid wasting public money. Thus, subcontracting legislation must require that overhead and other costs be included in the cost of providing the privatized service if these costs would continue with a contractor.

Omitting these costs results in more than avoiding mere "bean counting." If these costs are not included, no oversight may take place, and, as a result, services may be improperly performed or not performed at all.⁶⁸ Unless there is a specific provision for them, oversight costs are easily overlooked. Once the service is subcontracted, these costs might be omitted from the agency's budget. If there is no money to fund oversight, oversight will not be done.

Privatization proponents might argue that no oversight is necessary, that the market will ensure performance. Albany's experience with subcontracted vehicle maintenance demonstrated that oversight is necessary and that the associated costs can be substantial.⁶⁹ These costs included spending money to re-engineer the city's voucher and data-processing system, to buy additional computers, and to employ additional auditors and expert mechanics.⁷⁰

Proper oversight in the right (or wrong) circumstances may make the difference between life and death. This is not only a problem in public sector subcontracting, but rather, it is imbedded as a problem when different organizations, or even departments, must coordinate their activities. There is always a danger of things falling through the cracks, and subcontracting creates cracks in the structure of an enterprise. A major cause of the 1996 ValuJet crash was found to be a subcontracting arrangement that failed to provide definitively for oversight of critical maintenance functions.⁷¹ Oversight was omitted

67. Some states expressly require that overhead costs be included. See, e.g., MISS. CODE ANN. § 27-103-209(2) (2000).

68. For example, in February 2000, the Michigan Auditor General reported that the state had paid \$26 million to United Correctional Managed Care of Anaheim, California, but the company had spent only \$17 million on inmate health care, leaving \$9 million unaccounted for. See Putnam, *supra* note 48. The contract was terminated and the successor company had to shoulder \$12 million in unpaid bills. See *id.* It then negotiated a 40% increase in its contract. See *id.*

69. See SCLAR, *supra* note 1, at 116-17 (explaining that due to lack of oversight, Albany was overspending by 20% on privatized vehicle maintenance).

70. *Id.* at 117.

71. See *id.* at 16-17 (noting that ValuJet outsourced its aircraft maintenance operation and explaining how the crash was the result of a contractor's improper actions).

because it appeared to save money;⁷² however, in hindsight, we can see that the costs avoided were far less than the financial and human costs of the crash.

Unless oversight costs are accounted for in a subcontracting budget, this essential function is likely to be overlooked. On the other hand, when oversight costs are included, and included at an appropriate level, the government can hire people whose work is dedicated to oversight, and those paying the bills will be able to determine whether they are receiving value for their money.

Another easily overlooked cost, but a real one nonetheless, is that of converting or transferring a service to the private sector. Whether or not it is formally included in a budget or contract, someone must bear that cost—a cost which is not trivial. Indeed, it may be large enough to consume any apparent cost advantage. Arizona's privatization legislation mandates that the Office for Excellence in Government develop a model to estimate the total costs for providing a state function and develop a method for comparing those costs to private sector costs. The model must include costs of "conversion, transaction, disruption, contract monitoring costs, and revenue increases and decreases related to a privatization."⁷³ "Total costs" are defined as "all costs borne by an agency to provide a state function including all indirect costs and applicable allocated costs."⁷⁴ Arizona's legislation, however, does not require an actual study to ascertain these costs, but instead only permits such a study to be undertaken.⁷⁵

The issue of proper cost allocation is complex and for that reason alone can easily be mishandled. Each agency and state must undertake a study to identify and accommodate its idiosyncratic needs. In addition to overhead costs and transfer costs, agencies should include in their cost allocations training or retraining costs, which will be incurred in any transfer to ensure that the contracted-for level of service is provided.⁷⁶

72. See *id.* at 17 (contending that oversight measures that could have prevented the disaster "would have been more costly and diametrically opposed to [ValuJet's] business plan for maintaining low overhead in order to maintain low prices").

73. ARIZ. REV. STAT. ANN. § 41-2773(6)(a)(ii) (West Supp. 2000); cf. COLO. REV. STAT. ANN. § 24-50-503(1)(a)(II), (III) (West Supp. 2000) (excluding "indirect overhead costs" from the cost comparison, but considering "inspection, supervision, and monitoring").

74. ARIZ. REV. STAT. ANN. § 41-2771(9) (West 1999).

75. *Id.* § 41-2773(3).

76. Cf. KY. REV. STAT. ANN. § 45A.551(3)(d)(2)(e) (Banks-Baldwin 2000) (requiring that, after a state agency determines a service cannot be provided efficiently by the agency, the state agency must conduct a cost-benefit analysis as to costs, including retraining costs).

Even more fundamental to the problem of comparable costs is recognizing that there are a number of special problems in setting financial criteria with regard to public services. Privatizing government services is founded on the idea that markets set the proper price, but when there is no market, as when government provides a service or when there is a monopoly, the price will be too high.⁷⁷ However, there are a number of reasons why there may be no private market price. Most fundamentally, there may be no market to provide the sort of services that government does, because many government services are public goods.⁷⁸ Even where analogous services are provided privately—the “yellow pages” test⁷⁹—they may not be fully comparable. Ostensibly similar services may in fact be different, because government may have different goals than a private business.⁸⁰ When there is no market for the services to be subcontracted, it becomes difficult to feel assured that a proper price has been set.

Testimony by Geraldine Jensen, President of the Association for Children for Enforcement of Support (ACES), exemplifies this uneasiness. Jensen testified that

private vendors appear to vary prices charged for the same services provided. PSI charged Ohio, \$22,130, PA-\$34,190, WV-\$20,082, SD-\$11,800, AR-\$10,000 and RI-7,000 [sic] to review and update their child support guidelines. States seem to be unaware of the usual market price for services rendered. This information is needed to negotiate contracts.⁸¹

In fact, the differing prices could be the result of truly different services contracted for in these states and different conditions under which the contracts must be performed. On the other hand, price differences of over 50% in adjacent states and as much as 500% from the lowest to the highest price could be, as Jensen fears, an artifact of factors other than value provided or cost of rendering the service. With no market to set the price, it is reasonable to feel uneasy.

77. See generally HEILBRONER & THUROW, *supra* note 38, at 173-206 (explaining the market supply and demand model, rational market behavior, and the problems associated with monopolies, including increased prices).

78. See *id.* at 186-89 (defining and discussing public goods).

79. SCLAR, *supra* note 1, at 29. Sclar notes that a company passes the yellow pages test “by being one of the categories of potential sellers found in local telephone directories.” *Id.*

80. Indeed, the government provides many services with the purpose of promoting the public welfare. Some of the more obvious examples include highway maintenance, trash collection, and disease control.

81. *Social Services Privatization*, *supra* note 1, at 145.

The second major problem in setting a market price is that many public services are "priceless" in every sense of the word. Government services are often spoken of as essential services—so essential, in fact, that most public employees are not allowed to strike and thereby deprive the public of the service.⁸² Strike bans implicitly recognize that people depend on public services and that they expect such services to be of the highest quality. Put another way, were public services to be discontinued or withheld, the public could, effectively, be held hostage or extorted. For example, although trash pickup may seem to be mundane, undesirable work, we all know that failure to pick up and dispose of trash properly creates serious health risks. Even less frequent pickups—for example, monthly instead of weekly pickups—may be insufficient to insure public health. Water is another example. We all depend on access to a sufficient amount of uncontaminated water. It would be absurd to think that people would support privatization, no matter how much money it would save, if it meant receiving contaminated water and inadequate supplies—a problem that occurred with the privatization of water in England.⁸³

Continuity of service certainly must be included among important nonfinancial considerations. Public agencies must consider how continuity can be assured when work is performed by a private contractor whose workers have the right to organize, bargain collectively, and strike.⁸⁴ For those states in which public sector workers do not currently have the right to bargain collectively or to strike, privatization will necessitate a major change in relationships. It will mean that the employees of privatized agencies will fall under the jurisdiction of

82. See DONALD H. WOLLETT ET AL., *COLLECTIVE BARGAINING IN PUBLIC EMPLOYMENT* 252-87 (4th ed. 1993) (discussing rationales advanced in support of such non-strike policies).

83. See Poulter, *supra* note 24, at 5 (discussing the illness and death that occurred after a private British firm failed to clean up sewage, which resulted in the sewage being pumped into the sea); *Private Water*, *supra* note 24, at 2 (noting that Britain's private water companies placed the public health at risk "on more than 500 occasions over the past six years"). The water pollution even became an important electoral issue. See Frank Dobson MP, *Ending The Waste: Labour's Plans for a World Class, Water-Efficient, Sustainable Water Industry*, UNIVERSAL NEWS SERVS., Nov. 19, 1996 (criticizing the privatization decision and setting forth the methods by which the Labour Party could remedy the harmful results of the decision); Phil Murphy, *Labour Concern over Water Contamination*, PRESS ASS'N NEWSFILE, Sept. 26, 1996 (discussing the Labour Party's criticisms of the British government for failing to prosecute those responsible for the contamination of drinking water).

84. Indeed, the right of private sector workers to strike was cited by the Justice Department as a reason not to privatize certain prison facilities. *PRIVATE AND PUBLIC PRISONS*, *supra* note 22, at 1 (citing Letter from the Assistant Attorney General for Administration, Department of Justice, to various congressional committee and subcommittee chairmen and ranking minority members (June 5, 1996)).

the NLRA and will have the rights to bargain collectively and to strike.⁸⁵

If public work is indeed essential, then subcontracting decisions cannot be based solely or primarily on cost, and the need to set qualitative benchmarks cannot be ignored. An important step prior to advertising for bids is setting measurable quantitative and qualitative standards. Such standards can be developed as part of setting a baseline, as discussed below. As difficult as it can be to account for all costs, setting qualitative standards is much more difficult. The GAO's discussion of quality standards, applied in studies of prison privatization, provides some good examples of the sorts of problems that must be dealt with:

The concept of "quality" is neither easily defined nor measured. For example, although the American Correctional Association (ACA) sets accreditation standards for prisons, accredited facilities can vary widely in terms of overall quality. According to ACA officials, such variances occur because ACA accreditation means that a facility has met minimum standards.

Generally, however, assessments of quality can take several approaches. For example, one is a compliance approach, that is, assessing whether or to what extent the prisons being compared are in compliance with applicable ACA standards and/or . . . court orders and consent decrees. Another approach is to assess performance measures. For example, measures of safety could include assault statistics, safety inspection results, and accidental injury reports.⁸⁶

When the GAO reviewed surveys of both correctional staff and inmates concerning the quality of services at private and public institutions, it found that the results directly contradicted one another.⁸⁷ Neither was right nor wrong; they just had different needs and interests. This demonstrates both the difficulty of trying to make qualitative assessments of complex services objective, and thus comparable, and also illustrates the importance of relying on multiple sources to attain a full quality assessment.⁸⁸

85. See *infra* text accompanying note 146.

86. PRIVATE AND PUBLIC PRISONS, *supra* note 22, at 4-5 (footnote omitted).

87. See *id.* at 9 (noting that the correctional staff reported that the private prison "outperformed" the public facilities, while inmates reported that one of the public facilities "outperform[ed]" the private facility in all dimensions except "inmate activities").

88. See *id.* at 13 ("[I]t is important to use multiple indicators or data sources to provide cross-checks. The New Mexico study, for example, illustrates that divergent results can be

Qualitative standards may also be difficult to determine because professional judgment involves applying conflicting values based on complex, shifting, and unpredictable situations. Mark Nadel, Associate Director of the GAO's Income Security Issues, Health Education, and Human Services Division, observed:

[S]etting clear goals and measuring performance can be difficult. For example, programs may face competing or conflicting goals. In child welfare, program managers and workers must reconcile the competing goals of ensuring the safety of a child, which may argue for removing a child from his or her home, with the goal of preserving the family. As a result, measuring success may be difficult in some cases.⁸⁹

Furthermore, a decision must be made as to whether quality should be measured based on inputs or outputs. Inputs would include factors such as numbers of service providers, visits, or equipment. Outputs would examine results, such as health maintenance or improvement, or educational attainment.

It may be argued that public services have functioned without such detailed criteria and that, therefore, a private provider should be able to do so as well. However, a private provider may not have a clear stake in the service's success, but rather may be more interested in its stock's success and in projecting an appearance of success by enriching the company's shareholders.⁹⁰

These difficulties do not mean that quality benchmarks should not be set. While it may be impossible to set perfect standards, it clearly would be an abdication of responsibility to set none and thus make compliance oversight impossible. The proper approach would be to set quality benchmarks to the best degree that is humanly possible. If qualitative benchmarks cannot be set, then it will be impossible to monitor contract compliance. In that case, privatization should most likely not take place. Indeed, some government agencies have decided not to subcontract certain services precisely because it was too difficult to define and measure performance and then to express those standards in a contract.⁹¹

reached by using one data source (e.g., inmate surveys) versus another source (e.g., staff surveys).").

89. *Social Services Privatization*, *supra* note 1, at 40 (footnote omitted) (prepared statement of Mark Nadel).

90. See RICHARDS ET AL., *supra* note 37, at 76-77 (noting, in the context of school privatization, that private companies may be more concerned with the value of their stock than with the type of education they are providing).

91. Cf. LESSONS LEARNED, *supra* note 26, at 17 (reporting that "[o]fficials at all of the governments we visited said that one of the most important—and often most difficult—

Once qualitative standards are set, bidders must be required to demonstrate that they could meet or exceed these standards. National Association of Government Employees Legislative Director Christopher M. Donnellan told a congressional panel:

Contractors are able to present the agency with a seductive package of cost reductions by reducing the level of services. Inadequate investigations of the statement of work by the agency allows the contractor to achieve this result. In the interwoven environment of a federal installation, any reduction in support or related services will have a domino effect on the agency's capacity to perform.⁹²

Guarantees, not mere assurances, must be required. Documentation, rather than mere statements of good will, is necessary to prevent low-ball bids;⁹³ it is also necessary to guard against the possibility of awarding contracts to those unable to perform the work—either because they lack expertise or because they have submitted such low bids that they will lack the means to operate.⁹⁴ This means bidders need to provide sufficient detail as to their sources of financing, to explain how they plan to meet the requirements, and to back up their predictions with objective evidence indicating that they, in fact, could meet those requirements. Evidence must include the bidder's track record in performing similar work and in complying with government regulations.⁹⁵ Indeed, states should be proactive by sharing information as

tasks in privatizing government activities was writing specific work statements for the privatization contract," and that "Georgia and Virginia's guidance for evaluating whether a service should be considered for privatization focused on the ease with which the service's objectives could be defined and measured for monitoring purposes").

92. *Contracting Out—Successes and Failures: Hearing Before the Subcomm. on the Civil Service of the House Comm. on Gov't Reform and Oversight*, 105th Cong., at 22 (1997) (statement of Christopher M. Donnellan, Legislative Director, National Association of Government Employees).

93. *Cf.* COLO. REV. STAT. ANN. § 24-50-503(1)(a) (West Supp. 2000) (requiring privatization contracts to be conditioned upon "[t]he contracting agency clearly demonstrat[ing] that the proposed contract will result in overall cost savings to the state and that the estimated savings will not be eliminated by contractor rate increases during the term of the contract"). Initial bidding on privatized Denver buslines involved low-ball bids, which quickly doubled. *See* SCLAR, *supra* note 1, at 86.

94. *See, e.g.*, SCLAR, *supra* note 1, at 88 n.14 (noting that a Denver firm was forced to give up its contract 90 days after it began because it was unable to secure workers at the low wages necessary to meet its contract price).

95. Track record information would have proved valuable to states that contracted with Wackenhut, a private firm that received contracts to run prisons despite having compiled a troubled record at other facilities. Ken Kolker, *Changes Ahead for Troubled Prison*, GRAND RAPIDS PRESS, May 20, 2000, at <http://gr.mlive.com/news/index.ssf?news/stories/20000520gwackenhut021802.frm>; *see also infra* notes 103-104 (discussing the Wackenhut fa-

to price, performance, and vendor qualifications to ensure competitive prices and to guard against subcontracting to poor performers.⁹⁶

Massachusetts is a model in this area. It requires the head of the agency proposing privatization and the commissioner of administration to certify in writing to the state auditor: (1) that the quality of the services to be provided by the bidder is likely both to satisfy the established quality requirements and "to equal or exceed the quality of services which could be provided by regular agency employees" in the most cost efficient manner;⁹⁷ (2) that the contract cost will be less than the estimated cost based on best practice;⁹⁸ (3) that the contract takes into account compliance with all relevant statutes "concerning labor relations, occupational safety and health, nondiscrimination and affirmative action, environmental protection and conflicts of interest";⁹⁹ and (4) that the proposed contract is in the public interest.¹⁰⁰ The state auditor then may call witnesses to be examined under oath and for the production of records as part of his investigation into whether a service should be privatized.¹⁰¹

Essential information in determining whether subcontracting is appropriate includes details as to the number of workers who will be performing the work. This is the only way to ensure that the bidder is not low-balling the bid and can actually perform the work. Experience has shown that assurances as to staffing levels cannot be left unquestioned on the assumption that the subcontractor will be disciplined by the market.¹⁰² The market is more likely to discipline the public, who will risk losing vital services if the subcontractor can-

cility and its problems). Such a track record should signal trouble ahead, not a green light for future contracts.

96. Geraldine Jensen's comments make the need for such information sharing even more apparent: "We are concerned not only about the poor collection performances but with the apparent price gouging. Lockheed Martin IMS is receiving seven times as much money in Maryland as Virginia for doing exactly the same type of work. Who is responsible for monitoring contracts states have with private vendors?" *Social Services Privatization*, *supra* note 1, at 144 (statement of Geraldine Jensen, President, Association for Children for Enforcement of Support, Inc.).

97. MASS. GEN. LAWS ANN. ch. 7, § 54(7)(ii) (West 1996 & Supp. 2000).

98. *Id.* § 54(7)(iii).

99. *Id.* § 54(7)(iv).

100. *Id.* § 54(7)(v).

101. *Id.* § 55(b).

102. When asked about including this information, OMB's acting director for management, G. Edward DeSeve, responded that it was too expensive to collect this information and that there was no need to. Hanna, *supra* note 41, at D-20. He said that he was not willing to "assume that the competitive process required under the current federal acquisition regulations is insufficient to establish appropriate prices and quality levels." *Id.* (quoting G. Edward DeSeve).

not perform. In other circumstances, the contractor may provide poor services, but this may go undetected if the client population is incompetent or is a despised or powerless group. If information nonetheless leaks out, the state will be in the unpleasant situation of being forced to decide whether it should terminate the contract and step in and whether it has the ability to resume operation quickly. For example, Wackenhut Corrections Corporation, a private Florida prison management company that ran a Michigan youth prison, was forced to provide more training for guards and to recruit additional employees after a local Michigan newspaper reported dangerous conditions in the youth correctional facility.¹⁰³ The state was forced to route youth offenders to other facilities until the problems were resolved.¹⁰⁴ Similarly, when Educational Alternatives, Inc. (EAI), a provider of private educational services, was unable to meet educational qualitative criteria, the city of Baltimore was forced to decide among difficult courses of action, including bailing out the school system with public money to prevent its collapse.¹⁰⁵

Just as establishing uniform and reliable standards and procedures for cost accounting can ensure good decisionmaking and can avoid reinventing processes (and risk omitting necessary considerations) for each bid decision, so too should uniform standards be set for ascertaining desired levels of service. To the extent possible, these guaranteed levels of service should specify objective, measurable standards, as well as consequences for failing to achieve them. When a subcontractor can determine the level of services it is to provide and is required to pay for additional services that it finds necessary, it is given an incentive to find those additional services unnecessary.¹⁰⁶ Contracts with performance criteria linked to rewards and penalties pro-

103. Kolker, *supra* note 95.

104. Ken Kolker, *Inmates Shifted to Meet State Law*, GRAND RAPIDS PRESS, May 19, 2000, at A1. One additional problem with the prison was that the facility was housing inmates older than seventeen, in violation of state law. *Id.* However, Michigan's contract with Wackenhut guaranteed an occupancy level that was apparently difficult to meet with available offenders below that age. See Kolker, *supra* note 95 ("State law allows the prison system to house inmates there only if they were 16 and under when they committed their crime. But the State also was sending prisoners there who broke the law at age 17 or older. The 450-bed prison had housed 330 inmates age 19 and under.").

105. Jean Thompson et al., *Cutoff of EAI Saves Little; Scrapped Contract Does Not Resolve Schools' Money Crisis*, BALTIMORE SUN, Nov. 23, 1995, at 1A. See generally Rick Green, *EAI Rebounds with a New Name*, HARTFORD COURANT, Dec. 18, 1997, at A16 (discussing EAI's attempts to improve business after being "crushed by high-profile failures in Hartford and Baltimore"); Gregory Palast, *Profit and Education Don't Mix: Britain Should Learn a Lesson from the US*, OBSERVER (London), Mar. 26, 2000, at 7 (discussing EAI's background and failures in the United States).

106. Putnam, *supra* note 48.

vide an incentive for the contractor to do a good job¹⁰⁷ and also guard against possible claims by a contractor that it misunderstood what it agreed to.

Some laws do require a subcontractor to demonstrate that it can guarantee specified savings and higher levels of quality. For example, the District of Columbia requires a guarantee of a five percent savings.¹⁰⁸ Florida requires that before privatizing a prison, it must determine that subcontracting will save at least seven percent.¹⁰⁹ Arizona does not set a benchmark level, but instead requires the office in charge of privatization to "develop minimum savings criteria for governing the award of contracts resulting from the competitive government process."¹¹⁰

Mandating specific savings and requiring the subcontractor to demonstrate its ability to achieve them and to establish the means by which it plans to do so are prudent and reasonable requirements. Subcontracting comes with a cost in terms of upheaval, risk, and unforeseen consequences. Therefore, there should be a good reason to do it—demonstrably lower cost and guaranteed better service—unless a legislature has decided that privatization must take place for purely ideological reasons, without regard for the public welfare. The factors to be considered in subcontracting are complex and cannot fully be reduced to objective criteria; thus, even under the best of circumstances, relevant factors may be overlooked. Mandating a margin of demonstrated improvement is a way of taking these problems into account and is, in reality, a way of ensuring that the private service is not worse and that costs are not higher than before subcontracting. Otherwise, what appear to be cost savings in a bid may turn out to be cost overruns in reality.

It is unthinkable that any subcontracting legislation would fail to provide objective guidelines and standards. How else could administrators make responsible and wise decisions and ensure that the public receives the services it demands and needs at reasonable cost?

D. Accounting for Public Property

Public assets can take many forms, including structures, buildings, machinery, systems, land, water rights, easements and rights-of-way, improvements, utilities, landscaping, sidewalks, roads, curbs and

107. See RICHARDS ET AL., *supra* note 37, at 145 (noting that if contracts do not contain performance criteria, "there is less incentive for the contractor to do a good job").

108. D.C. CODE ANN. § 1-1181.5b(a)(2) (1999 & Supp. 2000).

109. FLA. STAT. ANN. § 957.07 (West 1996 & Supp. 2001).

110. ARIZ. REV. STAT. ANN. § 41-2773(5) (West 1999 & Supp. 2000).

gutters, equipment, furnishings, information, paying clientele, money, and employee knowledge and skills. It will increasingly take the form of intangible property.

Property connected with privatization not only may take many forms, but it also can be affected in many ways. In some cases, subcontractors have been given or lent public materials—equipment, buildings, or money—either directly or in the form of subsidies.¹¹¹ Other subcontractors may acquire, improve, or control public assets. Each of these situations creates its own problems. Some subsidies to subcontractors are direct and obvious,¹¹² but subsidies can take many, less obvious forms. Allowing a contractor to have or use public property acts as a subsidy to the sub-contractor and means that the contractor has not submitted a competitive bid unless the subsidy is taken into account. Entrusting assets to a subcontractor may mean that the government has left itself unable to reclaim the services when there is evidence of nonperformance or unsatisfactory performance. Therefore, if the subcontract involves the subcontractor's building or acquiring property to perform a service, there needs to be a means of returning that property to the public at a fair price based on the contract expectations.

However property comes into a contractor's hands, prudence demands that public assets be protected. Good practice would require accounting for such property at many points in the process. Public items must be included in cost accounting and protected from injury or waste during the contract term. They must also be returned to the public in a condition that does not diminish their value at fair cost at the end of the contract or upon default or breach. Otherwise, if no provision for their return is made, a contractor may appropriate, sell, transform, or waste assets.¹¹³

111. See, e.g., ELLIOTT D. SCLAR ET AL., ECON. POL'Y INST., *THE EMPEROR'S NEW CLOTHES: TRANSIT PRIVATIZATION AND PUBLIC POLICY* 26-27 (1989) (noting that the only savings to Louisiana taxpayers from a New Orleans privatization effort "come[] at [a] higher cost to U.S. taxpayers, who end up footing the bill for the [Urban Mass Transit Association] grants that subsidize the project and make it appear as a 'savings'").

112. For example, New Orleans would have incurred more than \$526,000 in additional annual costs in its contract to operate certain bus routes had the federal government not awarded a grant to subsidize \$1,467,000 each year. See SCLAR ET AL., *supra* note 111, at 26 & tbl.2 (illustrating the increased cost of privatization of several New Orleans bus routes by showing additional costs of contracting services).

113. In a privatization experiment, Greyhound Lines, Inc. operated buses owned by the Metro-Dade Transit Agency of Miami, Florida. SCLAR, *supra* note 1, at 114-15. After only eighteen months of service, the experiment was cancelled. *Id.* at 115. However, only ten of the forty new buses operated by Greyhound could be put back in service because they had been so poorly maintained. *Id.*

Before any public assets are entrusted to a subcontractor, they need to be identified, assessed, and properly valued. Montana, for example, requires a listing of all public assets and their intended disposition under a privatization plan.¹¹⁴ Depending on the sort of asset, valuation may either be simple or very complex. Many public assets are unique, and this may be true even of buildings. Thus, there may be no comparable properties to use in setting fair market value. Some public assets currently generate revenues or may be privatized in order to generate revenues.¹¹⁵ Privatizing a revenue-generating asset could mean depriving the public of income; in some cases, those revenues mean an asset has greater value to the public if it remains in the public sector.

If managing a public asset requires or entails some investment by the subcontractor, the contract must state how those investments will be treated at the contract's end. Depending on the circumstances, the investment could be removed by the contractor or could remain with the asset and be returned to the public (and potentially to a later contractor). If the latter occurs, there must be some consideration as to whether the government must reimburse the contractor for the investments and, if so, how to value them. All investments will be paid for with public funds, but in some cases they might be treated more appropriately as the government's investment, and in other cases as the contractor's investment. In some cases, investments may represent real value added, while in others they may be useful to the contractor but to no one else. Sometimes, improvements or investments cannot easily be separated from the asset. Certainly, parties will act differently during the term of the contract depending on how assets will be treated at its end. Failing to consider and agree upon how these assets and investments will be treated at the contract's end ensures a complex and costly dispute, whose costs may mean losing anything gained from privatization.

A state considering privatization should also decide whether and how to tax the assets and operations of the subcontractor. A failure to

114. MONT. CODE ANN. § 2-8-303(1)(d) (1999); *cf.* UTAH CODE ANN. § 63-95-402(1)(a)(ii), (b)(ii) (Supp. 2000) (providing that prior to privatizing a governmental function, the entity seeking privatization must submit recommended legislation that "address[es] the value of any interests the state holds in the quasi-governmental entity and whether the state should receive compensation for those interests as part of privatization" and that the privatization plan must be audited "to determine the amount, nature, and source of revenues and assets of the quasi-governmental entity").

115. *See, e.g.,* STARR, *supra* note 33, at 15-16 (discussing the possibility of privatizing the Postal Service and identifying the potential benefits of privatizing public housing).

tax when private property or businesses normally would be taxed is a hidden subsidy to a private business.¹¹⁶

If the contractor invests in the asset, there should be a decision as to whether the government will lend money to the contractor (and, if so, at what rate) or will assist the contractor in achieving favorable rates.¹¹⁷ If the contractor is allowed to charge the public in connection with the use of the asset, what use will be made of the money collected, and who will be entitled to what portion of it? In addition, will the contractor be able to set the rates unilaterally, or will the rates be controlled, approved, or set by the government? If the government pays a service fee to the contractor or becomes obligated financially in other ways as a result of the contract, how will that fee or other money be paid? By a bond, taxes, or otherwise?¹¹⁸ All of these questions must be addressed in advance of a privatization decision.

Assets that may be entrusted to the subcontractor include not only tangible items, such as buildings and equipment, but also fees or other money that the subcontractor collects and is supposed to forward to the public treasury. Money is fungible and easily misappropriated. Californians learned this lesson the hard way when, in 1997, a contractor left the state park reservation system in shambles when it absconded with \$1 million of public money.¹¹⁹ This was a disaster for a state that depends on tourism; California was left with the decision to either track down the money, to recoup it, or to write it off as a loss.

When the assets the subcontractor will acquire also include information, even more difficult problems arise. The government collects and maintains detailed, personal, and confidential information.¹²⁰ Considering the sensitive nature of much of the information that government agencies collect, it seems unlikely that the public would want it marketed to increase a subcontractor's profits. But contractors may

116. *Cf.* KAN. STAT. ANN. § 12-5509 (1991) (requiring private contractors to pay taxes on the revenue producing portion of a privatized facility).

117. *Cf. id.* § 12-5503(a)(3) (noting that a municipality that enters into a service agreement may "either pledge its full faith and credit or obligate a specific source of payment for the payment of the service fee").

118. *Cf. id.* § 12-5505 (authorizing a municipality to "levy property taxes, impose fees and charges, levy special assessments, [and] exercise any other revenue producing authority" for the payment of a service fee).

119. *See supra* notes 13-16 and accompanying text (further discussing the failure of the privatized California state park reservation system).

120. For example, government agencies keep detailed reports of income and its sources, data on mental and physical health, and contacts with government agencies and information on the purpose of those contacts—including library materials checked out, police contacts short of arrest and conviction, HIV status and dates of testing, and queries to public agencies.

feel tempted to use information as the valuable resource it is by selling or renting it. Information, as with other sorts of property that have been paid for by tax dollars, should not just be given away to subcontractors. As with other assets, a decision must be made as to the ownership of information at the contract's end.¹²¹

While it is easy to know if a tangible asset, such as a building or vehicle, has been returned, ensuring the return of information, especially electronic information, is more complex. When it is in electronic form—and with each passing day it is more likely that information will be in this form—information can be easily transferred and even broadcast. Unlike most forms of property, information can be both returned to the government and retained by the contractor. Thus, it is not sufficient only to demand its return at the contract's end; the subcontractor must also be required to divest itself of all copies.

Finally, government may decide it must retain the public's physical property and human capital so it can respond quickly to a crisis. For example, it is easy to see that government may need to keep reserves of oil, because it is in the national interest to protect the public from price and supply shocks.

But more than this, contracting out can "diminish[] government's expertise in key areas, and reduce[] its ability to address future problems."¹²² Maintaining in-house expertise also helps set competitive prices, particularly when there is no market; it can be used to test whether a private company can beat the government's price. Richard Boris, the Virginia Private Prison Administrator, observed:

If you privatized everything, you would have within about 10 years no expertise left within your department of corrections because they hadn't been running. You learn about running prisons by running prisons. . . .

If you ever had to take over a facility—now, this is a jail down in Texas, but I think it's Brazzio (ph) or whatever where we

121. If, for example, a private company contracts to publish statutes and judicial decisions and then claims it owns copyright in the material, the government may find itself embroiled in litigation to establish its ownership rights. Cf. Julius J. Marke, *Legal Compilations and the Public Domain*, N.Y.L.J., May 19, 1992, at 4, 4 (discussing the debate over whether certain legal compilations of materials belonging to the public domain may be afforded copyright protection); Richard C. Reuben, *A Recipe for Merger: Thomson and West Agree to Change an Antitrust Agreement in Response to Competitors' Criticisms*, A.B.A. J., Dec. 1996, at 28, 28 (discussing the licensing agreement between West Publishing Co. and its competitors for use of West's copyrighted page numbering system).

122. Hanna, *supra* note 41, at D20.

heard about the inmates from Missouri being beaten and there were videotapes shown on TV nationwide and all—where would you get correctional officers to move in quickly if you weren't running some of your own?¹²³

It can be just as important for government to have ready access to expertise—and even to develop and foster expertise—that has no use in the private market or that might even be seen as leading to an inefficient market. For example, a democratic government has a special obligation to serve underserved populations and even to protect them from market forces. The poor and disenfranchised are certain to be losers with privatization because they lack the money and power to have an impact on the market. A private market might find it advantageous not to provide services to these populations. Related to this, Jocelyn Frye, of the Women's Legal Defense Fund, argues that "certain tasks, such as setting eligibility requirements, are not appropriate functions for the private sector."¹²⁴

These miscellaneous services and means of providing them can be seen as assets or forms of property that democratic government—a government of, by, and for the people—needs to retain in order to perform its full range of functions.

E. Worker Protections and Regulations

Government as employer has always played an important role in modeling employer behavior by providing disadvantaged groups secure jobs at good pay and by making it possible for them to do work vital to the social fabric of this country. The impact of this role goes far beyond the pay packet of an individual worker who might not otherwise have had a job or as good a job, received a living wage, or been able to play an important role in promoting public policy. This arrangement has also helped secure a more equitable distribution of government services to all members of the community.¹²⁵ Workers who receive pay sufficient to support a family will pay taxes, will not require government services, and will raise children in the sort of environment more likely to lead them to be contributing members of soci-

123. *Morning Edition: Tennessee Private Prisons Debate* (NPR radio broadcast, Nov. 13, 1997) (statement of Richard Boris).

124. Kurt Fernandez et al., *Welfare: Labor Cheers, Texas Jeers HHS Decision Limiting Privatization of Texas Welfare Plan*, 1997 DAILY LAB. REP. (BNA), No. 88, at D9 (May 7, 1997) (quoting Jocelyn Frye).

125. Cf. SEIU LOCAL 660 RESEARCH DEP'T, THE PUBLIC COST OF PRIVATE CONTRACTING: A REVIEW OF LOS ANGELES COUNTY PROPOSITION A "PRIVATIZATION" PROGRAM ii (April 1991) (stating that over 80% of civil service jobs contracted out were held by black and Latino employees, but that, once contracted, the jobs paid \$300-400 less per month).

ety. Minority workers may have greater understanding of, or sensitivity to, their communities' needs and may literally be able to talk the language of disadvantaged parts of the community. They help make government for and of the people.

An overly zealous cost cutter in the private sector might not see this larger picture and might focus only on costs directly under its control, ignoring those that can be shifted to other parts of the government. Costs may be lowered and profits generated by cutting wages, lowering benefits, using more part time workers, or eliminating health insurance,¹²⁶ but is this desirable? To the extent decisions about subcontracting ignore factors other than the discrete cost of a job, they may end up being more costly to the government as a whole. If, for example, a contractor cuts costs by eliminating health insurance, government on some level is likely to have to pick up those costs—either through subsidizing public hospitals, through welfare payments, through paying an increased cost of care for persons who delayed seeking treatment and were made more seriously ill, through increased levels of disease in the population, or through other sorts of remediation made necessary by a lack of adequate health care.

The standard set by government as employer should continue to be the standard, even when the private employer is delivering a public service. Indeed, it is in the government's and the public's self-interest that this be the case. Colorado includes this as part of the policy behind its privatization statute,¹²⁷ and reinforces the policy by providing that, in comparing costs, any savings attributable to lower health insurance benefits provided by the contractor shall not be included.¹²⁸

Paying good wages is more than charity. It may also promote high quality public services. Wage levels may affect and reflect the quality of worker an employer can attract. While taxpayers might initially be pleased to get value for their money, in the sense of getting the service at a lower wage cost, employees willing to work for lower wages may not provide the value that more highly paid workers would. Low-waged work is the sort of work most prone to frequent turno-

126. In its 1984 study of privatization in the Los Angeles area, HUD found that private contractors' lower costs were explained in part by greater use of part time workers who were paid no benefits, received shorter vacations, and were less experienced, lower-skilled, and non-unionized. U.S. DEP'T OF HOUS. & URBAN DEV., *DELIVERING MUNICIPAL SERVICES EFFICIENTLY: A COMPARISON OF MUNICIPAL AND PRIVATE SERVICE DELIVERY*, 16-17, 25, 27, 39, 41-42 (June 1984); *see also* Wessel, *supra* note 1, at 45 (noting that localities favor contracting out "to avoid paying high public sector wages").

127. COLO. REV. STAT. ANN. § 24-50-501 (West Supp. 2000).

128. *Id.* § 24-50-503(1)(a)(IV).

ver,¹²⁹ but many public services need long term workers with historical knowledge of clients, methods, and services.¹³⁰

Several states with privatization statutes have attempted to address these concerns. Massachusetts, for example, requires that every contract must contain a statement that the subcontractor will comply with antidiscrimination laws and will take affirmative steps to comply with equal employment opportunity.¹³¹ A bidder must provide detailed information as to the wages it proposes to pay for each job.¹³² Montana requires that any privatization plan include a list of all workers employed in a program and "the estimated effect of the proposed privatization on their employment status."¹³³ This requirement is a way of ensuring that comparable services are being considered. For example, if a subcontractor were to offer a bid based on an average wage, that wage might be based on lower-paid job classifications than those of persons who would actually be capable of doing that sort of work. To remain within the contract price, the employer would have to raise the offered wages, but then could not afford enough workers to provide a comparable level of service. By requiring this information, the government is able to determine whether a service is likely to be provided at the contract price only by relying on unqualified workers or too few workers to deliver the service.

Some might argue that cutting wages is permissible as an exercise of the market. That is, if an employer can attract workers at lower wages, then that is the appropriate wage and any other is a waste of assets. However, if a contractor is allowed to withhold the provision of health insurance for its employees, and taxpayers have to subsidize the contractor's profits by bearing the cost of health care for uninsured workers, this means that taxpayers are subsidizing an uncompetitive private sector employer. To avoid subsidizing the employer and to ensure that privatization is competitive, the cost of the subsidy would have to be included in the bid, so it accounts for all costs of contracting and is fully comparable with public sector costs. Making such an assessment, however, would be very difficult. It is simpler to merely require that comparable working conditions continue, and thus that no subsidy is needed.

129. See SCLAR ET AL., *supra* note 111, at 29-30 (noting a correlation between wage level and rate of absenteeism and job turnover).

130. See, e.g., SCLAR, *supra* note 1, at 110 (referring to paratransit services where taxi companies and school-bus operators were well-suited for providing the services because they had experience providing door-to-door service, "a hallmark of paratransit").

131. MASS. GEN. LAWS ANN. ch. 7, § 54(3) (West 1996 & Supp. 2000).

132. *Id.* § 54(2).

133. MONT. CODE ANN. § 2-8-303(1)(c) (1999).

Legislatures also need to consider whether they will permit subcontractors to terminate and replace current workers. Allowing this raises a number of complex issues, including obligations owed to public employees and the need to ensure continuity of services. States that have addressed this issue have taken different approaches. Colorado forbids contracts that allow the termination of certified state employees from service as part of privatization.¹³⁴ Massachusetts requires the contractor to offer employment to qualified public employees who are displaced by subcontracting.¹³⁵ The District of Columbia provides that any subcontractor who displaces government employees must offer the employees a "right-of-first-refusal to employment by the contractor, in a comparable available position for which the employee is qualified, for at least a 6-month period during which the employee shall not be discharged without cause."¹³⁶ If the employee's performance during the six-month transition is satisfactory, the new contractor must offer the employee continued employment under the contractor's terms and conditions.¹³⁷ In addition, employees who are to be displaced must be given at least thirty days notice.¹³⁸ Montana requires that notice be given to an employee and the employee's collective bargaining unit "as soon as possible prior to privatization."¹³⁹ When more than twenty-five employees are affected, notice must be given at least sixty days prior to the privatization;¹⁴⁰ when fewer than twenty-five employees are affected, notice must be given at least fourteen days before privatization.¹⁴¹ Arkansas requires agencies that intend to lay off employees as a result of privatization to report those impending layoffs to the Legislative Council and the Office of Personnel Management of the Department of Finance and Administration.¹⁴² The report must include details about the number and grade of employees to be laid off and about how the decision to lay off was

134. COLO. REV. STAT. ANN. § 24-50-503(2) (West Supp. 2000); *cf. id.* § 24-50-504 (setting out criteria explaining when the use of independent contractors by private contractors is permissible).

135. MASS. GEN. LAWS ANN. ch. 7, § 54(3).

136. D.C. CODE ANN. § 1-1181.5b(a)(3) (Supp. 2000).

137. *Id.* § 1-1181.5b(a)(5). Florida provides that as part of a privatization project, public workers may be leased to the contractor. FLA. STAT. ANN. § 288.901(2) (West 1996 & Supp. 2000). Those employees retain their "state employee status" and their right to take part in the public employees retirement system. *Id.*

138. D.C. CODE ANN. § 1-1181.5b(a)(8).

139. MONT. CODE ANN. § 2-18-1206(1) (1999).

140. *Id.*

141. *Id.* § 2-18-1206(2); *cf. N.J. STAT. ANN.* § 30:1-7.4 (West Supp. 2000) (requiring that no decision be made by the Commissioner of Human Services to privatize any services if such a decision would abolish "100 or more non-vacant, full-time positions").

142. 1999 Ark. Acts 17, § 2.

made.¹⁴³ Those positions are then removed from the agency's budget for the next two years.¹⁴⁴

Many public sector workers are represented by unions; their right to join a union is protected by law in most states and is sanctioned by federal law and policy.¹⁴⁵ It is inappropriate for government to enter into a subcontracting arrangement that subverts workers' legal rights and deunionizes the workplace. Therefore, state legislatures should provide for the continuation of union representation of those workers if they are employed by a subcontractor. In fact, the National Labor Relations Act (NLRA) achieves just this result under the successorship doctrine.¹⁴⁶

There are many terms of employment in addition to wages, hours, and benefits that are set by regulations or public sector rules. A determination needs to be made whether and how these will apply to the private contract. Furthermore, if such terms do not apply to the contract, is there any reason why they should apply to the work when done in the public sector? Is there a reason to free a private contractor from regulations that might impede doing the work more efficiently in the public sector?

Not only do regulations protect public sector workers, they also impose special requirements on them. Residency requirements are an example. One concern that might arise as a result of subcontracting is how to ensure that a subcontractor—particularly if it is an out-of-town corporation—is responsive to the community's needs and concerns. Traditionally, city governments have tried to ensure this by imposing residency requirements on public employees.¹⁴⁷ When a

143. *Id.*

144. *Id.* § 3.

145. See HARRY T. EDWARDS ET AL., *LABOR RELATIONS LAW IN THE PUBLIC SECTOR: CASES AND MATERIALS* 8 (4th ed. 1985) (remarking that only ten states have not adopted public-sector bargaining laws).

146. See *Lincoln Park Zoological Soc'y v. NLRB*, 116 F.3d 216, 218, 219 (7th Cir. 1997) (holding that the successorship doctrine, which states that a new employer that hires a majority of its employees from its predecessor activates the bargaining obligation of the NLRA, is consistent with the NLRA when majority status is attributed to a union that has been voluntarily recognized by the predecessor employer).

147. These residency requirements have become the subject of litigation. See, e.g., *United Bldg. Constr. Trades Council v. Mayor of Camden*, 465 U.S. 208 (1984) (holding that a municipal ordinance requiring that at least forty percent of employees of contractors working on city construction projects be Camden residents was not unconstitutional); *White v. Mass. Council of Constr. Employers, Inc.*, 460 U.S. 204 (1983) (holding that the Mayor of Boston's executive order requiring that at least half of the workers on all city construction projects be residents of Boston was not unconstitutional); *McCarthy v. Philadelphia Civil Serv. Comm'n*, 424 U.S. 645 (1976) (holding that a Philadelphia regulation requiring that city employees be residents of Philadelphia was not unconstitutional).

service is privatized, the need to bind the contractor to the community still exists. Consideration should be given to whether the contract should impose residency requirements, and, if so, whether the requirements should also apply to all or a percentage of officers and stockholders in the private company.¹⁴⁸

In short, in subcontracting it is important to consider the role and purpose of regulations affecting the employment conditions of public workers. The public should not allow these important requirements to be subverted so that they subsidize uncompetitive employers. These ends can be promoted by requiring that contractors be bound by the same laws as government agencies, such as providing a nondiscriminatory workplace, fair working conditions, and the continuation of these conditions into the private sector. To ensure that these requirements are met, government may require that bonds be posted, may provide incentives for meeting and exceeding certain benchmarks, and may assess penalties for failure to meet stated requirements.

III. PROCEDURAL CRITERIA

The need to have a special procedure for making decisions about contracting out government services may not be obvious. After all, government at all levels has long purchased private services and goods.¹⁴⁹ However, there are important differences between the sorts of contracting out done in the recent past and today.¹⁵⁰ Special interest groups lobby vigorously in favor of contracting out government services. There appears to be public support for it, and a wide range of institutions are being considered for some degree of marketization.

Certainly, there is a qualitative difference between buying toilet paper from the lowest bidder and providing health and disease control services. With the former, decisions are much simpler. Price is likely to be the most important consideration, and it is easy to set quality criteria. With the latter, while no one would want waste or overspending, quality and continuity of the service will be far more important, and the criteria to be considered will be much more com-

148. See Rudd, *supra* note 22 (asserting that "[a]ny city privatization proposal should require officers and stockholders in the private company to abide by the same residency requirements that city employees work under").

149. STARR, *supra* note 33, at 1.

150. *But see* Adler, *supra* note 35, at 1. Moshe Adler describes an earlier period in which "contracting out was a mature system that was already as good as it could possibly be. And it was precisely then that governmental production came to America. The realization that every possible improvement to contracting out had been tried led city after city to declare its failure." *Id.*

plex. It is far easier to assess whether toilet paper meets specifications and to find another supplier if problems with the contractor arise than it is to make quality assessments when the service in question is health and disease control. Furthermore, finding a substitute provider for disease control would be much more difficult, and the consequences to public welfare more dire, if the subcontractor were to fail to perform satisfactorily.

Establishing specialized procedures for each step of subcontracting—from soliciting bids, to assessing bids, to oversight—becomes far more important as requests to subcontract become more common, the criteria more complex, and the consequences of mistakes more serious. Only experienced, sophisticated, and qualified decisionmakers using centralized, established processes can ensure that these procedural needs are met and that accountability exists as well.

There are a number of necessary steps involved in deciding whether to subcontract. How these steps are divided is a matter that each governmental unit must decide based on its own needs. They could be assigned to one entity—an entity given complete responsibility for subcontracting—or they could be subdivided among different entities. In making that decision, a state would want to consider whether its goals are more efficiently achieved by vesting responsibility in one agency or by distributing them among more narrowly specialized bodies, whether oversight of the decisionmaking process is more effective when carried out by one body or by separate agencies acting as checks on one another, and whether quasi-legislative or quasi-executive roles are better kept separate or integrated. Finally, the entities need to conform to the existing state governmental structures.

Alaska provides an example of a privatization body with a very broad agenda. Its Commission on Privatization and Delivery of Government Services has an extensive, sophisticated, and flexible mandate. That mandate requires the Commission to address how to most appropriately deliver a service: to study existing services and determine whether they are more suitably delivered by federal or state government, the public or private sector, or consolidated public agencies.¹⁵¹ To achieve these ends, the Commission is to review and evaluate other states' policies and recommendations, to solicit public

151. 1999 Alaska Sess. Laws 61, § 5(a)(3); *cf.* GA. CODE ANN. § 36-86-4 (2000) (defining a procedure for assessing the efficiency of local government services and determining the need for consolidation or privatization of such services); LESSONS LEARNED, *supra* note 26, at 2 (noting that recent federal laws and initiatives have "direct[ed] federal managers to review their programs by first considering whether government should be performing [a given] activity").

comment about contracting out, and to review Alaska's contracting policies and procedures.¹⁵² The Commission then identifies whether state functions could be more efficiently and effectively provided by transferring them to the private sector, local government, regional service organizations, or the federal government; by retaining them at the state level; by eliminating them; by agency consolidation or other changes; or by a combination of these.¹⁵³

The basic functions of such a privatization body include: (1) proposing regulations; (2) identifying potential functions to subcontract; (3) collecting information; (4) assisting an agency in instituting best practices to establish a baseline; (5) drawing up bid specifications and promoting competition by permitting public bids; (6) receiving bids; (7) taking evidence and testimony relevant to the decision; (8) deciding whether to subcontract and, if so, which bid to accept; (9) negotiating the contract; (10) exercising oversight; (11) terminating contracts; and (12) prosecuting breaches and other misfeasance. Details of each of these procedural steps are discussed below, and a range of options are canvassed. In many cases, there is no one best way to achieve the goals of wise contracting. Rather, each state must choose a process that suits its specific needs and goals.

A. Proposing Regulations

If detailed substantive guidelines are necessary, some body will have to promulgate them. It might be that, after hearings, a legislature would enact highly detailed statutes spelling out those guidelines. On the other hand, it is not unusual for a legislative body to enact broad statutes, delegating the duty to be more specific. In other words, the responsibility of providing details could be part of a privatization agency's duty. This decision of which governmental entity will provide the details will depend on the degree to which a legislature desires to subject privatization regulations to more or less politicized decisionmaking and whether there is a desire to delegate responsibility to an expert body. The decision as to whether delegation is even appropriate will, of course, depend on each state's constitution and administrative agency laws. Even if a given agency does not have the power to regulate, it might provide useful expertise in advising the legislature on future enactments.

Arizona, for example, charges its Office of Management and Budget with designing standardized methodology for how the state

152. 1999 Alaska Sess. Laws 61, §§ 5(a)(1), 5(a)(6), 5(a)(2).

153. *Id.* § 5(a)(3).

identifies and evaluates state functions to subcontract and with determining if future competitive contracting with the private sector and other government agencies is in the best interest of the state.¹⁵⁴ Thus, the Arizona legislature has ceded to this office not only the responsibility of identifying which services will be privatized,¹⁵⁵ but also the responsibility of establishing privatization procedures and guidelines.¹⁵⁶

B. Identifying Potential Functions to Subcontract

Government agencies can take either an active or passive role in initiating privatization. Agencies that take the active approach seek out functions that might be provided more efficiently by the private sector. On the other hand, an agency can play a relatively passive, almost judicial role that would involve only weighing the decision rather than seeking out functions that are ripe for privatization. If a state takes an active role, then some agency must be charged with initiating an evaluation of functions to be privatized.¹⁵⁷ Arizona takes a highly active role with a strong tilt toward promoting privatization. It characterizes the performance of public services as "unfair competition,"¹⁵⁸ suggesting possible capture by a free market ideology. The relevant statute declares: "[T]his state's fiduciary responsibility to taxpayers [is to encourage] value in the provision and delivery of state services by identifying and pursuing opportunities for increasing the use of market forces in the delivery of state services, while preventing unfair competition between state agencies and the private sector."¹⁵⁹ In contrast, the Kansas performance review board—a body established to review whether state government functions are being executed efficiently—assumes a more passive role.¹⁶⁰ The board initiates a study of

154. ARIZ. REV. STAT. ANN. §§ 41-2771(1), 41-2772(A)-(B) (West 1999).

155. *Id.* § 41-2772(A)-(B).

156. ARIZ. REV. STAT. ANN. § 41-2773 (West 1999 & Supp. 2000). The office also reviews petitions forwarded to it by the private enterprise review board. *Id.* § 41-2773(6)(d).

157. See LESSONS LEARNED, *supra* note 26, at 10-11 (noting that some state governments have established support staffs, which typically use an analytical framework to evaluate the performance of government activity and the potential risks and benefits of privatizing such activity).

158. ARIZ. REV. STAT. ANN. § 41-2772(A) (West 1999).

159. *Id.*; see also ARIZ. REV. STAT. ANN. § 41-2773(1) (West 1999 & Supp. 2000) (charging that the Office of Management and Budget "[s]hall develop, implement and manage a statewide competitive government"). Utah takes a similar view. See UTAH CODE ANN. § 63-55a-3(1)(b) (1997) (requiring that its Privatization Policy Board review "requests for privatization of services and issues concerning agency competition with the private sector and determine whether privatization would be feasible and would result in cost savings and ways to eliminate any unfair competition").

160. See KAN. STAT. ANN. § 75-7101 (1997).

the privatized government function and whether it should be or should remain in the private sector only *after* it receives a request from the public or from government employees.¹⁶¹

Most other states that take an active role assume a less ideological approach than does Arizona and instead focus on identifying potential functions to subcontract by using criteria based on cost and quality.¹⁶² For example, Mississippi's Joint Legislative Committee on Performance Evaluation and Expenditure Review analyzes all areas of state government to identify programs and services that could be performed by the private sector at lower cost or greater efficiency.¹⁶³ The Committee is charged to consider options such as contracting out, competitive bidding, and the sale of state assets.¹⁶⁴

Montana uses a two-way process. The state's legislative auditor is charged with identifying subcontracted programs that could be administered more cost-effectively directly by the agency, as well as agency functions that could be more efficiently performed in the private sector.¹⁶⁵ In addition, "[m]embers of the public, elected bargaining agents or employee representatives, elected officials, legislators, and agency directors may submit to the legislative audit committee a request to review programs being conducted under contract by an agency that may be administered more cost-effectively directly by the agency."¹⁶⁶

161. The Kansas Board is to initiate an analysis of government function when it receives:

- (1) A written suggestion or complaint regarding the opportunity to modify, eliminate or delegate to the private sector a governmental function by a citizen of the state including legislators and public employee organizations;
- (2) a petition of private interest, wherein a private firm indicates both the interest and capability of providing a service currently provided by state government;
- (3) a private sector complaint of public sector competition, wherein a private firm submits a written allegation that state government is providing or offering a product or service that is available from the private sector and is in competition with the private firm; or
- (4) a written suggestion by a public employee or a public employee organization regarding the opportunity to review a governmental function that has been delegated to the private sector.

Id. § 75-7104(a)(1)-(4).

162. *See, e.g.*, MISS. CODE ANN. § 27-103-209(2) (2000) (requiring the state's Joint Legislative Committee on Performance Evaluation and Expenditure Review to file a report "with the objective of identifying programs and services that can be performed by the private sector with lower cost or increased efficiency"); MONT. CODE ANN. § 2-8-303(1)(g) (1999) (requiring that any privatization plan consider the estimated cost and quality differences that would result from the plan's implementation).

163. MISS. CODE ANN. § 27-103-209(2).

164. *Id.*

165. MONT. CODE ANN. § 2-8-304(1).

166. *Id.* § 2-8-304(2).

The more active the agency is in seeking out functions to subcontract, the better it is to have a separate agency decide whether to subcontract. An agency that both seeks out bids and decides whether to subcontract has an inherent conflict of interest. It cannot credibly decide whether to subcontract in instances in which it has initiated the process for fear of actual or perceived lack of impartiality.

C. Collecting Information

Both as part of the process of initiating the decision to consider functions for subcontracting, and as a step to be taken once that decision is made, a more in-depth analysis of the functions needs to be made. This ties in with the earlier discussion on assessing qualitative and cost criteria and is set out here as a multi-step process using Louisiana's statute for guidance.

Louisiana provides an example of the sorts of sources of information to be sought. Its legislative auditor may:

- (1) Evaluate the basic assumptions underlying any and all state agencies and the programs and services provided by the state to assist the legislature in identifying those that are vital to the best interests of the people of the state of Louisiana and those that no longer meet that goal.
- (2) Evaluate the programs, policies, services, and activities administered by the agencies of state government and identify overlapping functions, outmoded programs or methodologies, areas needing improvement, and/or programs amenable to privatization.
- (3) Evaluate the impact, effectiveness, and cost-effectiveness of all state agencies and of their programs, services, and activities.
- (4) Evaluate the efficiency with which state agencies operate the programs under their jurisdictions and fulfill their duties.
- (5) Evaluate methods agencies use to maximize the amount of federal and private funds received by the state for its programs in order to ensure that the people of Louisiana receive a fair share of the taxes which they pay to the United States government and to provide for the effective efficient use of private resources.
- (6) Evaluate the management of state debt.
- (7) Evaluate the assessment, collection, and application of user fees.
- (8) Make recommendations each year relative to the programs and services the various state agencies provide as well as recommendations for elimination of or reduction in fund-

ing for agencies, programs, or services based on the results of performance audits. Such recommendations shall be submitted in a report to each member of the legislature no later than February fifteenth each year.

(9) Make annual recommendations to the appropriate oversight committees of the legislature and the Legislative Audit Advisory Council as to amendments to statutory and constitutional provisions that will improve the efficiency of state government, including, if appropriate, recommendations concerning the reorganization or consolidation of state agencies.

(10) Evaluate the methods used by each agency in the estimation, calculation, and reporting of its performance, and evaluate the actual outcomes of each agency's performance with regard to its performance indicators . . . and provide agencies with information relative to the methods used to evaluate such performance.¹⁶⁷

The state auditor is to be assisted in this evaluation by state agencies that are charged with developing measurable performance criteria, including program goals and objectives.¹⁶⁸

Other states might choose to emphasize other sources of information to be considered at this preliminary step; this decision is highly dependent on each state's needs and goals. However, Louisiana's approach provides a useful look at the range of information that can be used.

D. Assisting an Agency in Instituting Best Practices to Establish a Baseline

When Joni Mitchell observed, "You don't know what you've got 'til it's gone,"¹⁶⁹ she was not advocating this as good practice. Privatization should not be consummated until you know what you have—what it costs and how it operates. Therefore, it cannot be known whether contracting out will improve public services without first establishing a baseline understanding of the existing service. Such an assessment needs to take place early in the process, before bids are requested.¹⁷⁰

167. LA. REV. STAT. ANN. § 24:522(C) (West Supp. 2000).

168. *Id.* § 24:522(D).

169. JONI MITCHELL, *Big Yellow Taxi*, on LADIES OF THE CANYON (Reprise Records 1970).

170. Privatization advocates contend that privatization should take place even when government is performing optimally in order to benchmark government performance against private firms. See Roger D. Feldman, Presentation to D.C. Privatization Task Force 4 (Apr. 25, 1995) (transcript on file with author).

As discussed above, this quantitative, qualitative, and cost determination of the scope and nature of the service is not easy. It must include computing all costs connected with providing the service, assessing current workload and performance standards, and considering the target population and the service's role in the community. Under the best circumstances, this process can have—and has had—highly beneficial effects.¹⁷¹ The process of self-analysis is essential when determining how to reorganize in a way that provides the most efficient and economical service.¹⁷² An in-depth assessment will move the agency toward the twin goals of improving service and saving money.

Some might argue that this step is unnecessary, that an inefficient service does not deserve a chance to lift its game, and that, in any case, simply contracting out will bring market forces to bear and result in improved service. Indeed, some state legislatures not only fail to require a reorganization process, they essentially forbid it by mandating privatization. Arizona, for example, *requires* the administration of its welfare reform program to be contracted out.¹⁷³ Only if no qualified provider can be found or in the event of provider failure can the program be run by the Department of Economic Security.¹⁷⁴

Such an inflexible mandate is not in the public interest. If a state skips this important step of establishing a baseline understanding of existing service, it will never know whether subcontracting saved any money or provided better service, because there will be no comparison with the highest level achievable by the public sector.¹⁷⁵ Any private company that can outperform the best practice a public agency can offer would then truly be an improvement and would lead to savings.

171. Massachusetts provides a good example. See *infra* note 209 and accompanying text (discussing the Massachusetts statute that allows the state to privatize services only after providing written evidence that privatization will save money and improve the quality of service).

172. See, e.g., SCLAR, *supra* note 1, at 71 (describing how a pre-privatization cost analysis of the municipal pipe laying department in Fort Lauderdale, Florida, led to that department's reorganization and a decision not to privatize, which saved the city millions of dollars).

173. ARIZ. REV. STAT. ANN. § 46-300.01(A) (West Supp. 2000) (stating that the Department of Economic Security "shall" contract with a provider or providers of welfare to work programs).

174. *Id.* § 46-300.01(D)(3)-(4).

175. Cf. HEBDON, *supra* note 26, at 35-36, 37 (explaining the importance of quality assessments and noting that in some cases, the outcome of such assessments might be skewed because private companies might have more modern equipment at their disposal); *id.* at 57-60 (discussing specific cases of cost and quality assessments, some of which provide examples of how *not* to conduct such a study).

The process of study and reorganization should not simply be left to an individual agency; rather, it should be done under the guidance, and with the assistance, of an expert body—in particular, a centralized privatization body. Although the agency's management and employees will have valuable information about that agency's functions, they will almost certainly need help in rethinking the organization. A body with reorganization experience that adopts a facilitative approach can perform a particularly valuable role. Such a body cannot perform a reorganization, however, without the help of the public workers who understand the nuances of their jobs. Oklahoma, for example, recognizes that current employees are essential to the reorganization process. The state's privatization statute requires that before state services can be privatized, "the agency must allow its employees the opportunity to submit proposals" to improve its operations and efficiency.¹⁷⁶ In other words, the best reorganization is a two-way process.

E. Drawing Up Bid Specifications and Promoting Competition by Permitting Public Bids

Once a reorganization has taken place and cost, quantity, and quality standards have been ascertained, the bid specifications can be drawn up. Massachusetts provides:

The agency [proposing privatization] shall prepare a specific written statement of the services proposed to be the subject of the privatization contract, including the specific quantity and standard of quality of the subject services. The agency shall solicit competitive sealed bids for the privatization contracts based upon this statement. The day designated by the agency upon which it will accept these sealed bids shall be the same for any and all parties. This statement shall be a public record, shall be filed in the agency and in the executive office for administration and finance, and shall be transmitted to the state auditor for review¹⁷⁷

Although it should not be controversial, there are some who argue that public workers should not be allowed to bid on continuing to perform their own work. They content that public workers have an unfair advantage because they are familiar with the work and because agencies, as governmental entities, are not required to pay taxes.¹⁷⁸

176. OKLA. STAT. ANN. tit. 74, § 589(A) (West Supp. 2001).

177. MASS. GEN. LAWS ANN. ch. 7, § 54(1) (West 1996 & Supp. 2000).

178. The Freedom from Government Competition Act, Senate Bill 314, introduced in 1997, and Senate Bill 1724, introduced in 1996, required that each agency obtain its goods and services by procurement from "private sources." S. 314 § 3(a), 105th Cong. (1997); S.

Gary D. Eugebretson, President of the Contract Services Association of America, testified before the House Committee on Government Reform:

For the private sector, the playing field is not, and likely never will be, entirely level. This is primarily due to the fact that, despite several recent laws, the government does not have cost accounting systems in place to provide accurate or reliable financial data on workloads, does not have to pay taxes, and the methods by which it computes its overhead rates are not comparable with those of industry, nor does the government "pay" for infrastructure (e.g., buildings and land). In addition, the government does not face, either qualitatively or quantitatively, the same risks as a commercial contractor (e.g., on issues relating to termination for default, absorption of cost overruns or potential Civil False Claims penalties).¹⁷⁹

The better reasoned view is that the public welfare depends on public workers being allowed to bid. This is the only way to ensure that the bidding is truly competitive and that taxpayers' interests are protected.¹⁸⁰ If the market is the force that improves service, then it is essential to ensure that a market exists. The optimum situation to promote competition and better service cannot be subcontracting to one bidder; wherever possible, an agency should subcontract to as

1724 § 3(a), 104th Cong. (1996). The Act thus virtually mandated contracting out and outsourcing.

179. *Prepared Testimony of Gary D. Eugebretson, President, Contract Servs. Ass'n of Am., Before the House Comm. on Gov't Reform, Subcomm. on Gov't Mgmt., Info. & Tech.*, FED. NEWS SERV. (Mar. 16, 2000).

180. See LESSONS LEARNED, *supra* note 26, at 9, 14-15 (discussing local jurisdictions that have benefited from competition between public employees and the private sector for the rights to provide services). AFSCME Vice President Joe Flynn complains that, in fact, much work that should be competitively bid under OMB Circular A-76 is privatized with no competition:

Currently, most work is contracted out without public-private competition by DoD [the Department of Defense]—the agency often held out as the champion of OMB Circular A-76. Although DoD contracts out in excess of \$60 billion annually, public employees have no chance of competing for almost all of that work even with the Pentagon's increased reliance on the circular. For example, according to an Army study, only 16,000 contractor jobs out of the service's entire contractor workforce of 269,000 were competed through OMB Circular A-76.

Prepared Testimony of Joe Flynn, Nat'l Vice President, 4th Dist., Am. Fed'n of Gov't Employees, AFL-CIO, Before the House Comm. on Appropriations, Subcomm. on Defense, FED. NEWS SERV. (Mar. 29, 2000). OMB Circular A-76 establishes the federal government's policy regarding the privatization of public services. See OMB Circular No. A-76 (revised), 48 Fed. Reg. 37,110 (Aug. 16, 1983).

many bidders as possible.¹⁸¹ The reality, however, is that there may not be many bidders. In many cases, the service may not be one that is provided by private contractors. Allowing the current workers to bid on their own work helps create the best semblance of a market in this sort of situation. Certainly, excluding any legitimate bidder artificially restricts competition. Furthermore, excluding the workers who have been providing the service stacks the deck and all but ensures that the work will be contracted out, even if no one could do the work better or at lower cost. It seems unlikely that most taxpayers would favor contracting out a service at higher cost, but this may well happen by barring the current workers from bidding. If competition is supposed to ensure that services are provided in the most efficient way, it makes no sense to exclude from bidding government workers or any group which otherwise meets the substantive criteria.

There is one other way in which allowing public workers to bid on their own work is essential to promoting the public interest. If workers know that they are unable to bid and that the work will be contracted out, they are unlikely to be willing participants in efforts to rationalize and improve their agency's function. If public workers know that they have a period of time in which to make their agency operate as efficiently as possible and that if they do so they will retain their work, then they have a strong incentive to put every effort into the process. The beneficiary will be the public.

Many of the states that have subcontracting legislation do permit public workers to bid on their work.¹⁸² The District of Columbia requires that any solicitation for privatization contracts must include information concerning a procedure by which the current government employees may bid on the contract.¹⁸³ Massachusetts has a detailed process:

181. In some states, however, the difference between promoting real competition as opposed to transforming a public monopoly into a private monopoly appears to have been overlooked. *See, e.g.*, KAN. STAT. ANN. § 12-5508 (1991) (providing that a municipality contracting out for the provision of public services may agree to vest the exclusive right to provide the services in the private contractor). There is nothing about a monopoly that is likely to involve competition, and thus it is unlikely that such a situation will yield the improvements sought.

182. *See, e.g.*, D.C. CODE ANN. § 1-1181.5b(a)(6) (Supp. 2000) ("Any solicitation for proposed contracts . . . shall include information concerning the procedure by which current [D.C.] government employees may exercise the right to bid on the contracts[.]"); MASS. GEN. LAWS ANN. ch. 7, § 54(5) ("After consulting any relevant employee organization, the agency [proposing privatization] shall provide adequate resources for the purpose of encouraging and assisting present agency employees to organize and submit a bid to provide the subject services.").

183. D.C. CODE ANN. § 1-1181.5b(a)(6).

(4) The agency [proposing privatization] shall prepare a comprehensive written estimate of the costs of regular agency employees' providing the subject services in the most cost-efficient manner. The estimate shall include all direct and indirect costs of regular agency employees' providing the subject services, including but not limited to, pension, insurance and other employee benefit costs. For the purpose of this estimate, any employee organization may, at any time before the final day for the agency to receive sealed bids . . . propose amendments to any relevant collective bargaining agreement to which it is a party. Any such amendments shall take effect only if necessary to reduce the cost estimate pursuant to this paragraph below the contract cost Such estimate shall remain confidential until after the final day for the agency to receive sealed bids for the privatization contract . . . at which time the estimate shall become a public record, shall be filed in the agency and in the executive office for administration and finance, and shall be transmitted to the state auditor for review

(5) After consulting any relevant employee organization, the agency shall provide adequate resources for the purpose of encouraging and assisting present agency employees to organize and submit a bid to provide the subject services. In determining what resources are adequate for this purpose, the agency shall refer to an existing collective bargaining agreement of a similar employee organization whose members perform the subject services, if available, which agreement provides similar resources in the same or other agencies; provided, however, that if no such collective bargaining agreement exists, the agency shall refer to any existing collective bargaining agreements providing such resources, and shall provide such resources at the minimum level of assistance provided in said agreements. The agency shall consider any such employee bid on the same basis as all other bids. An employee bid may be made as a joint venture with other persons.¹⁸⁴

This process provides a practical way to ensure that a private contractor receives a contract only as a result of demonstrating that it can improve upon the public service.

184. MASS. GEN. LAWS ANN. ch. 7, § 54(4)-(5).

F. *Receiving Bids*

Once bid specifications are released, an agent must be designated to receive the bids and process them. Later steps are considered below, but preliminary functions should include basic procedures, such as checking that all bid requirements have been complied with and preparing the bids for the decisionmaking process. This should include an initial investigation and factual assessment of the undertakings set out in the bid. In other words, at some stage, a "background" check must be performed as to objective information. The agency can consider more contested information in later steps.

G. *Taking Evidence and Testimony Relevant to the Decision; and* H. *Deciding Whether to Subcontract and, If So, Which Bid to Accept*¹⁸⁵

Decisions to contract out government services, when made lightly, risk interrupting service and decreasing the quality of services. Nevertheless, many legislatures stack the deck by limiting the information to be sought or by allowing only certain information to come before the decisionmaker.¹⁸⁶ This is sometimes done by restricting the composition of the decisionmaking body to less than all of the interested parties, by limiting it only to privatization partisans,¹⁸⁷ or by limiting those to be consulted.¹⁸⁸ Such restrictions ensure that optimum decisions cannot be made.

Legislatures should consider how open the process of making subcontracting decisions should be. On the one hand, decisions could all be made out of the public's sight; on the other, the process could be an open one, complete with notice and an opportunity for interested parties to be heard. Montana, for example, provides that before privatizing a program, an agency is to prepare a privatization plan that must "be released to the public and any affected employee organizations."¹⁸⁹ The plan must also "be submitted to the legislative audit committee at least 90 days prior to the proposed implementation date."¹⁹⁰ No less than thirty days later, the legislative audit com-

185. Although different steps, these two share many common procedural concerns, and thus it is more economical to consider them together.

186. See *infra* notes 193-194 and accompanying text (discussing the statutory requirements in Utah and Virginia that limit the source of information and decisionmaking process to favor privatization).

187. See *infra* notes 203-205 and accompanying text (citing Arizona as an example of a state achieving a pro-privatization bias by limiting the composition of the decisionmaking body).

188. See *infra* note 205 (discussing Mississippi's consultation limitations).

189. MONT. CODE ANN. § 2-8-302 (1999).

190. *Id.*

mittee must conduct a public hearing to receive public comments and testimony.¹⁹¹ Fifteen days prior to the proposed implementation date, the committee is required to make public a summary of the results of the hearing and the committee's recommendations.¹⁹²

Certainly, providing sufficient notice, a timely public hearing, or other public input in a manner that allows a meaningful opportunity to be heard will help ensure prudent decisionmaking that takes into account a wide range of needs and issues. To some degree, though, the question of how to receive information—by public comment, hearing, or otherwise—will depend on both the nature of the service being considered for privatization and practice within the geographical area.

1. *Information.*—Some states limit the information to be considered to that which favors privatization. Utah's privatization board, for example, is charged with the responsibility of maintaining communication with, and access to, information from entities promoting privatization,¹⁹³ but it is not similarly charged to seek out information from those opposed to or neutral on privatization.¹⁹⁴ The better practice is to require consideration of a wider range of evidence, including that which does not support privatization. Montana, for example, requires that a privatization plan include "a narrative explanation and justification for the proposed privatization,"¹⁹⁵ as well as

(e) an estimate of the cost savings or any additional costs resulting from privatizing the program, compared to the costs of the existing, nonprivatized program. Additional costs must include the estimated cost to the state of inspection, supervision, and monitoring of the proposed privatization and the costs incurred in the discontinuation of such a contract;

(f) the estimated current and future economic impacts of the implementation of the plan on other state programs, including public assistance programs, unemployment insurance programs, retirement programs, and agency personal services budgets used to pay out accrued vacation and sick leave benefits;

191. *Id.*

192. *Id.*

193. UTAH CODE ANN. § 63-55a-3(1)(e) (1997).

194. Similarly, Virginia's Commonwealth Competition Council is charged with promoting privatization, but the legislature failed to require the Council to consider whether the state *should* be privatizing. See VA. CODE ANN. § 9-342 (Michie 1998).

195. MONT. CODE ANN. § 2-8-303(1)(i).

- (g) the estimated increases or decreases in costs and quality of goods or services to the public if the plan is implemented; [and]
- (h) the estimated changes in individual wages and benefits resulting from the proposed privatization¹⁹⁶

Colorado specifically requires considering “[t]he consequences and potential mitigation of improper or failed performance by the contractor.”¹⁹⁷ It further demands the consideration of whether privatizing a particular service would amount to an improper delegation of a state function.¹⁹⁸

These sorts of information, as well as anything relevant that is provided by any interested parties, should certainly be considered before a state decides to privatize a government function. In short, states need to recognize that, with so much at stake, they need a wide range of information. It is difficult to understand why any state would have legislation that does not require this. Those that fail in this regard are failing the trust placed in them by those they represent.

2. *The Decisionmaker’s Qualifications.*—If a state or other governmental entity is considering a program of contracting out government services, it is essential that it establish an expert body to assess bids, to ensure that all procedural and substantive requirements are met, and to create a uniform process. The officers of that entity must have sufficient skills and access to information to be able to assess complex financial and technical specifications and bids. Finally, the decisionmaker must be both impartial and perceived as impartial. Alaska’s chief procurement officer, for example, is part of the partially exempt service and must have “at least five years of prior experience in public procurement, including large scale procurement of supplies, services, or professional services, and must be a person with demonstrated executive and organizational ability.”¹⁹⁹ While the requirement of relevant experience is obvious, states may want to consider whether such officials might need the due process rights provided by civil service coverage.

196. *Id.* § 2-8-303(1)(e)-(h).

197. COLO. REV. STAT. ANN. § 24-50-503(1)(f)(I) (West Supp. 2000).

198. *Id.* § 24-50-503(1)(f)(II); cf. Shenk, *supra* note 29, at 19 (“Asked by Senator David Pryor (D-Arkansas) if other government contractors were performing ‘inherently governmental functions’—deciding where and how to spend taxpayer money and exercising judgment on matters of due process—a GAO report responded with a resounding yes. In just a few agencies it found dozens of examples.”).

199. ALASKA STAT. § 36.30.010(a) (Michie 1992 & Supp. 1995). By being partially exempt, the chief procurement officer can be fired only for cause; other parts of the civil service rules do not apply. *Id.*

Again, the legislature should consider the points at which such an office would become involved in the process. If the functions are divided among different entities, this would affect the relevant basic qualifications for each of the entities. States with existing programs vest this function of deciding whether and what to contract out in a number of different offices.²⁰⁰ To some extent, these reflect political or practical views and the variety of duties vested in the body. The wider the range of responsibilities vested in the agency, the harder it will be to find people competent to perform them all. On the other hand, if duties are divided among different agencies, some means of ensuring coordination must be established. Given the wide range of services provided by government, collaborative work is the only means of ensuring that relevant expertise is brought to bear on each decision. The exact qualifications are highly dependent upon the structure of the contracting process, the size of state government and the state's population, and the degree to which services are publicly provided. Certainly, deep experience with public administration is indispensable.

3. *The Membership of the Decisionmaker.*—One way to ensure access to the best information possible is to include a wide range of interests among members of the body that makes the decision. The interests represented should include those for and against privatization, and those of public employee unions, public employers, agency clients, the community at large, and the business community.

Almost as important as which interests are included is the appointment process. Utah's Privatization Policy Board, for example, is composed of thirteen members who serve staggered four-year terms.²⁰¹ The governor is directed to appoint two senators and two representatives, one from each political party; two members to represent public employees, whose names are to be recommended by the largest public employees' association; one member from state management; five members from the private business community; and one member representing education.²⁰²

In contrast, Arizona's legislative mandate to privatize the administration of its welfare program is carried out by its works agency pro-

200. See, e.g., *id.* (vesting in the commissioner of administration and the chief procurement officer the power over procurement of supplies, services, and professional services).

201. UTAH CODE ANN. § 63-55a-2(1)(a), 2(2)(a) (1997).

202. *Id.* § 63-55a-2(1)(b).

curement board.²⁰³ The board's membership makes unlikely the existence of anything other than a bias toward privatization. The statute states that the board is "established to receive proposals and award a contract by January 1, 1999 with a private entity for implementation of the Arizona works program."²⁰⁴ The board, whose members are appointed by the governor, is made up of nine members: (1) the director of the department of economic security; (2) two persons from the private sector with procurement experience; (3) two representatives of a major employer in the state; (4) two representatives from community based organizations; and (5) two representatives from small businesses in the state.²⁰⁵ Missing from the board are important interested parties, such as representatives of employees, unions, and welfare recipients.

Alaska's eleven-member commission not only has a far more representative composition than does Arizona's, but its members are also likely to represent the interests they are appointed to serve. Rather than being appointed by the governor, some members are selected by interest groups. The commission includes:

- (1) one member of the senate appointed by the president of the senate who shall serve as co-chair;
- (2) one member of the house appointed by the speaker of the house who shall serve as co-chair;
- (3) one member appointed by the Alaska Municipal League;
- (4) two public members appointed by the president of the senate, one of whom shall be a representative of a Native corporation . . . ;
- (5) two public members appointed by the speaker of the house, one of whom shall be a representative of a Native corporation . . . ;
- (6) one member appointed by the Alaska State Chamber of Commerce;
- (7) one member appointed by the American Federation of Labor-Congress of Industrial Organizations;
- (8) one member from the minority caucus of the house appointed by the speaker of the house; [and]

203. See ARIZ. REV. STAT. ANN. § 46-343 (West Supp. 2000) (establishing the Arizona works agency procurement board and charging it with the task of implementing Arizona's welfare to work program).

204. *Id.* § 46-343(A).

205. *Id.* § 46-343(A)(1)-(5). Similarly, Mississippi charges the body that reviews governmental functions for possible privatization to consult with representatives from the private sector, but no other constituencies—a highly skewed and limited directive. See MISS. CODE ANN. § 27-103-209(2) (2000).

(9) one member from the minority caucus of the senate appointed by the president of the senate.²⁰⁶

The statute further expands the input the commission receives by providing for the appointment of an advisory council to assist the commission in carrying out its duties.²⁰⁷

It might be argued that there is no point in including public employees on such a board because they will do no more than be obstructionist. However, Representative John L. Mica (R-Fla.), chairman of the House Government Reform and Oversight Subcommittee on Civil Service, contends that "federal employees should have the chance to challenge cost-saving claims."²⁰⁸ Challenging claims in such a context and forcing claimants to upgrade information is a vital way to protect the public interest—as important as providing the information initially.

Indeed, it needs to be recognized, admitted, and taken into consideration that the process of subcontracting is a very political one with strong feelings on both ends of the spectrum and that public employees, eager to save their jobs, are not the only ones whose position might have some elements of predictability. This means that while it is important to have the involvement of partisans who will actively advance their views, if the process is to be free from charges of corruption, incompetence, or favoritism, it is vital that the office and officer charged with making the decision be isolated from political pressures and not be seen as partial.²⁰⁹ Alaska attempts to achieve this

206. 1999 Alaska Sess. Laws 61, § 2

207. *Id.* § 2(b). Kansas has established a performance review board of five members, at least one of whom must have cost accounting experience. KAN. STAT. ANN. § 75-7102(a) (1997). No more than three members may be from the same political party. *Id.* The members of the board are appointed by the governor, subject to senate confirmation, for four-year terms. *Id.*

208. Hanna, *supra* note 41, at D-20.

209. The importance of preventing the perception of partiality and of protecting the decisionmaker from political pressure was demonstrated in Massachusetts, after the state legislature passed a subcontracting law in 1993 designed to save taxpayers money, ensure continuity of service, and prevent graft and corruption. See MASS. GEN. LAWS ANN. ch. 7, §§ 52-55 (West 1996 & Supp. 2000). Under the "Pacheco law," the state can only contract out government services if it is given written evidence that subcontracting will save money and improve the quality of service. *Id.* § 54(7). See generally Bruce A. Wallin, *The Need for a Privatization Process: Lessons from Development and Implementation*, 57 PUB. ADMIN. REV. 11, 16, 18 (1997) (discussing the development of the Pacheco law and examining its underlying principles).

In 1997, Massachusetts State Auditor Joe DeNucci, the individual charged with administering the law, refused to approve a plan to privatize transit routes because there was no evidence that privatizing them would save any money or improve service. Robert A. Jordan, *DeNucci Resists False Lure of Transportation Privatization*, BOSTON GLOBE, May 18, 1997, at C4. DeNucci explained that the private bidders had "significant performance

goal, in part, by providing that its chief procurement officer is appointed to a term of six years and may be removed by the commissioner of administration only for cause.²¹⁰

Although it is rarely addressed in subcontracting legislation, avoiding conflicts of interest and the appearance of partiality by the actual decisionmaker must be made a priority.²¹¹ Given the very nature of the undertaking, there are enormous opportunities for corruption, insider dealing, and the like—all of which give decisionmakers the opportunity to corrupt the process and compromise the public welfare for their own, or someone else's, benefit.

Utah, for example, has taken the initiative to avoid these problems by forbidding certain interactions when a quasi-governmental entity is privatized.²¹² These include forbidding certain individuals—such as officials of the quasi-governmental entity, lobbyists, and entities in which those individuals hold business interests—from receiving specified benefits under privatization contracts.²¹³ The forbidden benefits include receiving compensation from a quasi-governmental entity, if payment is conditioned in whole or in part on legislative or executive action related to privatization; receiving assets of the quasi-governmental entity or its successor; and receiving certain forms of compensation related to privatization.²¹⁴ Violations can result in felony, misdemeanor, and civil penalties.²¹⁵

In short, the membership of such a decisionmaking body must be both inclusive and exclusive. It must include the input of all interested constituencies, but also exclude improper influence.

problems' in other cities," that the plan called for giving them heavy subsidies, and that the bid failed to include important information concerning how the work would be performed. *Id.* Despite the apparent problems with the proposal, DeNucci's decision was attacked by those who alleged that he was "anti-privatization." *Id.* But see A. Joseph DeNucci, *Privatization Should Deliver Ample Benefits*, TELEGRAM & GAZETTE (Worcester, Mass.), Mar. 22, 1996, at A13 (commenting on his role as a state auditor and his willingness to approve privatization plans when they were capable of improving quality and lowering costs).

210. ALASKA STAT. § 36.30.010(a) (Michie Supp. 1995).

211. See SCLAR, *supra* note 1, at 105-06 (stating that privatization must be strictly supervised to recognize and prevent incidents of corruption and graft); *id.* at 164-66 (discussing the need to separate politics from subcontracting decisionmaking).

212. See UTAH CODE ANN. § 63-95-401 (Supp. 2000).

213. *Id.* § 63-95-401(1).

214. *Id.* § 63-95-401(2).

215. *Id.* § 63-95-403.

I. Negotiating the Contract

Once a decision is made to award a contract, someone must undertake the negotiations. Many of the issues involved at other steps also apply here, including the need for expertise, avoiding partiality, specifying standards, and oversight. It is also important at this stage to negotiate the details of terminating the contract. Virtually all elements discussed above concerning substantive criteria come into play in negotiating the contract.

The one fact that should be emphasized is that contract negotiation involves highly specialized skills. This is particularly the case in subcontracting. The negotiators must be pessimists in the sense of trying to predict and provide for all potential errors, defaults, and misfeasances. The need for these special skills should lead legislatures to consider who can best perform the critical role of negotiator. Although the public agency would have expertise in the nature of its work, it would not necessarily have expertise in negotiating and preparing contracts. In addition, the agency is likely to be seen as biased. Thus, while the public agency certainly should be available for consultation on technical matters, care should be taken in determining just what role it will play in the negotiation process. This, again, is a job that may be carried out better by a centralized body, but not necessarily one comprised of the same people who made the decision to subcontract. Assessing information and making the ultimate decision to contract out require different skills than those required for negotiation.

Furthermore, by the time the negotiation stage has been reached—especially if layoffs are contemplated—the affected employees' union must become part of the process. Failure to do so constitutes a breach of the duty to bargain and may result in public liability for back pay, benefits, and reinstatement of the workers.²¹⁶

216. See, e.g., Elsa Brenner, *Westchester Briefs: Privatization Setback*, N.Y. TIMES, Nov. 16, 1997, at 14WC-8 (reporting on a state administrative law judge's ruling against a county medical center that unilaterally subcontracted some services without negotiating a settlement with a nurses' union); see also *In re N.Y. State Nurses Ass'n*, 31 Off. Dec. of N.Y. Pub. Employ. Rel. Bd. 3034 (1998) (upholding a state administrative law judge's decision to restore a contracted-out unit of a county medical center, to reinstate a county employee to her original employment, and to award to that employee damages for lost wages, benefits, and conditions of employment).

J. Exercising Oversight

A recent GAO study found oversight to be the weakest element of privatization.²¹⁷ One committed to the marketplace as a fully self-regulatory mechanism might argue that there need be no oversight of subcontracted work. However, the market conditions of competition, with many small buyers and sellers and complete information, are unlikely to exist for most types of governmental functions. Therefore, some method of ensuring compliance with contract terms is necessary. Some entity must be charged with ensuring that subcontracted work meets the agreed-upon criteria during the term of the contract and with assessing whether the express performance benchmarks are adequate or need improvement.²¹⁸ Oversight must take place on a regular and frequent basis to ensure actual performance and quality. Oversight is also essential to provide early warning of problems in order to prevent a subcontractor from absconding or engaging in financial improprieties. If oversight is not frequent and regular, problems that could have been prevented may become serious and even irreparable.

Oversight requires regular reporting to the legislature, to the executive, and to the public. Reporting should be on at least an annual basis—or more frequently, if necessary.²¹⁹ More frequent reporting is

217. See *Social Services Privatization*, *supra* note 1, at 40 (prepared statement of Mark V. Nadel, Associate Director, U.S. General Accounting Office) (citing LESSONS LEARNED, *supra* note 26, discussing GAO studies that concluded that the monitoring of a subcontractor's performance is the weakest link in the privatization process, and underscoring difficulties encountered in setting clear goals for performance measurement). The need for oversight is demonstrated in a report by the California State Auditor examining the state contracting process. Although not dealing with the contracting out of government services, it details many serious problems, including avoiding competitive bidding, and thus increasing costs; failing to specify benchmarks so oversight could be exercised; and omitting any method for planning, monitoring, and evaluating performance. CAL. STATE AUDITOR, STATE CONTRACTING: REFORMS ARE NEEDED TO PROTECT THE PUBLIC INTEREST (Aug. 1996). All of these could easily arise in contracting out government services.

218. See LESSONS LEARNED, *supra* note 26, at 16 (reporting that, according to the government officials surveyed, "monitoring and oversight that not only evaluates compliance with the terms of the privatization agreement but also evaluates a private firm's performance in delivering services is needed when a government's direct role in the delivery of services is reduced through privatization"); *id.* at 18 (reporting that all of the officials surveyed believed that "independent oversight of privatization efforts was critical").

219. Arizona's welfare privatization program requires bimonthly reporting with a comprehensive report at the end of the first year to determine: (1) whether the private contractor has met the contract's requirements, the goals of the program, and the requirements of its performance bond; (2) "[t]he fiscal impact of Arizona works implementation"; and (3) the impact of Arizona works implementation on placement of recipients in paid employment, reduction of caseloads, and development of community partnerships. ARIZ. REV. STAT. ANN. § 46-344(A), (B) (West Supp. 1999). A more comprehensive report is required in the fourth year of the program. See *id.* § 46-345(A). In addition to the sorts of informa-

advisable where sensitive matters are handled, large sums of money are involved, or interruption or degradation of service would be especially serious.

The skills needed by an oversight body include proficiency in contract auditing and performance monitoring. Contract auditing ensures that payment is made only as provided in the contract, while performance monitoring ensures that services meet quality standards.²²⁰

The oversight body itself can take many forms, depending on the situation. It can, for example, be lodged within the department whose work was subcontracted, if that is appropriate and can best assure proper performance.²²¹ That department has the advantage of expertise—and thus can more accurately assess whether the contract terms are being carried out—and can also make recommendations for improvement. Another oversight candidate would be the same body that decides whether to subcontract. Both candidates fully understand the context in which the subcontracting is taking place. Certainly, in all but the simplest contracting out situations, the assessment criteria are many and complicated and often cannot be understood outside their context.

However, there are important reasons why neither should be the overseer—and certainly not the sole overseer.²²² Most fundamentally,

tion required in the annual report, the fourth-year report must include a survey of client satisfaction. *Id.* § 46-345(A)(5).

220. See LESSONS LEARNED, *supra* note 26, at 17 (discussing the two methods used to monitor privatization).

221. Arkansas, for example, requires that when state functions of the Division of Youth Services are privatized, the contract must "include a performance evaluation provision that outlines a method for evaluating the service provided under the contract." ARK. CODE ANN. § 25-10-137(a) (Michie 1999). The legislature further demands that the Division "identify the goals and performance indicators of the contract and how the state agency intends to evaluate the service provided." *Id.* In addition, the Department of Human Services must make an annual report to the legislature concerning the subcontractor's performance. *Id.* § 25-10-137(b).

222. See LESSONS LEARNED, *supra* note 26, at 18 (finding that "[i]ndependent oversight by an office that is outside the control of the unit responsible for operating the activity provides more objective and unbiased evaluation of privatized activities than is possible by senior government managers or program-level monitors").

Joshua Wolf Shenk reported that the Department of Energy (DOE)—which "relies more heavily on the private sector than any other agency," with eighty to ninety percent of its budget paid to private companies—has a "miserable record." Shenk, *supra* note 29, at 17. At Rocky Flats plutonium plant, Rockwell International, a private contractor for the DOE, "poured toxic and radioactive waste into the ground, and stored more in leaky metal drums," leaving "108 separate waste dumps and toxic solvents in the earth at 1,000 times the acceptable concentration." *Id.* Officials of the DOE "gave Rockwell \$27 million to clean up five 'ponds' of radioactive and hazardous waste that it had helped create." *Id.* at 17-18. But Rockwell "bungled" the procedure, and the GAO estimated that cleaning the

only an overseer that has no other goal than determining whether the contract terms have been met can make a fair assessment and also be perceived as capable of making a fair assessment. Agency capture, cronyism, and even conflicts of interest between an agency, the entity that decided to subcontract, and a subcontractor must play no part in the oversight process.

Elliott Sclar describes the many ways in which Massachusetts's decision to subcontract road maintenance suffered from oversight by an interested party.²²³ The governor's administration that had advocated privatization wanted to prove the program was a success.²²⁴ As a result, costs were deferred to later years or were shifted to inappropriate accounts; public sector workers were pressed into service to perform the subcontractor's work; public assets were lent to the subcontractor; supervision costs were understated; important parts of maintenance went undone as a result of the haste with which the privatization occurred; the performance of many tasks did not meet the requirements of the contract; and no benchmarks or baselines were created.²²⁵ Worst of all, the oversight body set up by the executive branch was not motivated to find any fault with the subcontractor's performance—rather, to find only success.²²⁶

An oversight body should have distance from individual contractors so it is not tempted to slant its findings—something that is easy to do and difficult to detect when complex criteria are involved. It is important that the oversight agency and the body deciding whether to subcontract not be ideologically motivated, nor be the captive of ideologues with rigid positions on privatization, nor have other motives unrelated to the public's interest.

ponds would take until 2009, and would cost over \$170 million. *Id.* at 18. However, the DOE gave the contractor a rating of 90 out of 100 and paid \$26.8 million in bonuses. *Id.* "The department's management is so thin and the burden of oversight so heavy that there is virtually no accountability." *Id.* Shenk concluded:

[W]hen the government contracts out, the lack of qualified managers—or sheer incompetence—often leads to a surrender of authority to the shadow government. With time, as contractors make the crucial decisions and develop expertise and authority, the government starts working for the contractor instead of the other way around. Decisions that should be the province of elected officials fall into the hands of hired guns.

Id.

223. SCLAR, *supra* note 1, at 28-46.

224. *See id.* at 33.

225. *See id.* at 33-42 (discussing the various findings of two independent examinations by a legislative audit bureau and the state auditor that challenged the administration's assertion that the privatization program was a success).

226. *See id.* at 34 (discussing oversight problems in the context of the Massachusetts road maintenance privatization contract).

Hiring contractors to monitor one another's performance is also an inappropriate method of oversight. While it may appear that their natural competitiveness and expertise would make them especially good critics of each other's performance, they may, in fact, extend "professional courtesy" to one another, hoping a "kind" eye will later examine their own operations. ACES President Geraldine Jensen testified:

Another expensive and worrisome practice is when states hire one vendor to monitor another vendor's performance. For example: Massachusetts paid Lockheed Martin IMS \$13.2 million for a computer system and paid Maximus \$1.9 million to monitor the Lockheed Martin IMS contract. Oklahoma paid PSI \$1 million for work on the computer and then paid Maximus \$102,000 to monitor PSI's contract. We are concerned that having one vendor monitoring contracts of another, gives both vendors an incentive not to complete the contract on budget and on time. Cost overruns and not meeting deadlines has been a repetitive problem found with vendors on state automated child support enforcement systems.²²⁷

The oversight process must give the public easy access to lodge complaints, to ask questions, and to get responses. If the public cannot find someone to whom problems can be reported, then no one can be held accountable,²²⁸ and subcontracting may fail to provide a superior service or even the same level of service.

In short, an oversight body must not be or appear to be taking action for any reasons other than ones based on law and fact. Unfortunately, privatization contracts can be so lucrative and so many people have vested interests by the time subcontracting takes place—including governmental entities—that the list of candidates can be

227. *Social Services Privatization*, *supra* note 1, at 145 (statement of Geraldine Jensen).

228. Geraldine Jensen testified:

ACES members in all of the states utilizing private companies for child support enforcement report problems identifying that a private company was responsible for action on their case. They also experienced the inability to find the government agency responsible to monitor the private company to voice a complaint of problems with the contractor. Attached to my testimony is a list of states who have contracts with PSI, Maximus and Lockheed Martin IMS. Families who report little or no action or incorrect action on their cases by private vendors cannot determine who to hold accountable. If the family is lucky enough to be able to determine which government agency hired the vendor, the state agency often tells them there is nothing they can do because the case has been turned over to a private company.

Id.

short. What is needed is officials who are knowledgeable, but who also are bound by ethical rules and their own conduct to perform these duties with the highest degree of probity, isolated from improper influence.

K. Terminating Contracts

Contracts may terminate either when the contract's end date is reached or when there is a breach.²²⁹ Some states mandate a term limit. Massachusetts, for example, limits the term of privatization contracts to five years.²³⁰ There are both advantages and disadvantages to such a scheme. On the one hand, it may be disruptive to have a periodic reassessment of the initial decision to subcontract. On the other, a fixed date means all parties know there is a chance of nonrenewal. Most affected would be the subcontractor, who will be unable to feel he has gained a sinecure and will be impelled to perform at a level that will make it likely that the contract will be renewed.

A specific termination date requires the government to assess whether the subcontractor met the goals set for privatization. By having a specific date, the government can either be ready for a graceful transition to another contractor or be prepared to recapture the work.

Some privatization experiments do fail, and when they fail, the government—preferably through well thought-out contract processes—must be prepared to step in. Privatization failures without forethought can be disastrous. When EAI failed to meet its contractual undertakings, the city of Baltimore was suddenly faced with the prospect of having to step in to ensure that public education could still be provided.²³¹

Having specific safeguards may help prevent such a problem by making it clear what the consequences are. Fallback arrangements can include financial protections, such as requiring the contractor to put up a bond or buy insurance, as well as contingency provisions to resume public services if the contractor is dismissed or leaves. The contract should determine the level of financial protections appropriate to the situation. Ideally, it should provide for liquidated damages to cut the likelihood of protracted litigation over damages.

229. See E. ALLAN FARNSWORTH, *CONTRACTS* § 8.8, at 551-52 (3d ed. 1999).

230. MASS. GEN. LAWS ANN. ch. 7, § 54(1) (West 1996 & Supp. 2000).

231. Cf. *supra* note 105 and accompanying text (noting the City of Baltimore's forced decision to bail out its school system with public money to prevent the system from collapsing).

In short, although it is always difficult to think about failure or endings at the start of a new enterprise, no privatization contract should be let without such forethought and contingency planning.

L. Prosecuting Breaches and Other Misfeasance

Subcontracting legislation should include an enforcement mechanism. This could rely on an array of litigation or para-litigation devices, including mediation. This is the one area in which most states should already be well prepared and not need specialized provisions. It is likely that failures to comply can be adequately dealt with through existing criminal or civil penalties, or, if necessary, contract remedies built into the subcontracting arrangement. States have experience dealing with extortion, bribery, misfeasance, and breach of contract. Nonetheless, each state may want to assess, at the time it sets up a privatization process, whether existing remedies are sufficient, or whether subcontracting-specific remedies are necessary.

IV. CONCLUSION

There are important questions that need to be asked and answers that are never given when it comes to privatization. Must privatization take place with none of the guidance that experience and common sense can provide? Must people be victimized by scams, failures, and cost overruns in the name of privatization? The answer is "no." We can protect our assets and services, save taxpayers millions of dollars, and prevent graft and corruption if our leaders only have the wisdom and courage to learn from privatization mistakes and successes. This is a case in which being wise requires hard work and the courage to stand up for what is right in the face of those who preach a simple and seductive message: the market will provide.

Our political leaders need to remember that what most taxpayers want is good quality and stable public services at a reasonable cost—not subcontracting to satisfy an ideology or to help a subcontractor make a profit. As tempting as it is to avoid the complex decisions necessary to decide whether a specific service is best provided by the public or private sector, legislators know they have a responsibility not to waste public money, and they certainly do not want to be accused of causing waste by making ill-advised, poorly thought-through decisions.

If states continue to subcontract without taking precautions to safeguard the public, waste and poor service are likely at best. At worst, there may be disasters. It is not too late to learn from past mistakes and use common sense to make wiser decisions about how to provide public services.